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1 IN THE UNITED STATES BANKRUPTCY COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 RICHMOND DIVISION
4 _____x
5 In re: : Chapter 11
6 CIRCUIT CITY STORES, INC., : Case No. 08-35653
7 et al., :
8 Debtors.: Jointly Administered
9 _____x

10 December 22, 2008

11 Richmond, Virginia

12 **ROUGH COPY: NOT FOR OFFICIAL USE**

13 Rough transcript of hearing in the above
14 matter held before the Honorable Kevin R Huennekens.
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1 APPEARANCES:

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THE COURT:
THE CLERK: In the matter of circuit city
stores incorporated case number 35653.

THE COURT: Good morni ng.
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6 MR. FOLEY: Good morning, Your Honor. Doug
7 Foley with McGuire Woods on behalf of the debtors.
8 With me today, co-counsel at the table, is Greg
9 Galardi and Fredericks from the law firm of Skadden
10 Arps. Also here today from the company, Your Honor,
11 is the general counsel Reggie sitting in the front
12 row.

13 Your Honor, we filed an amended agenda
14 yesterday as we're trying to see if we can resolve
15 as many of these matters as we can. What we would
16 propose to do, Your Honor, is to go through the
17 first few items which I believe most are either
18 uncontested or can be adjourned by agreement. And
19 then spend most of the the time on the second half
20 of the agenda this morning.

21 Your Honor, the first item on the agenda
22 actually should come off. It's a resolution of the
23 out standing issues with respect to insurance with
24 respect to utilities. I don't believe there's
25 anyone here that needs to address that motion. That

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1 should come off the docket.

2 THE COURT: All right.

3 MR. FOLEY: Your Honor, the next items are
4 claims trading motion with respect to sell down
5 procedures and equity and trading of claims. Your
6 Honor, we're still working through final objections
7 with respect to that and we'd like the court to
8 adjourn that to the January 16th hearing.

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9 THE COURT: All right. It will be adjourned.

10 MR. FOLEY: Your Honor, item number 3 is the
11 motion for relief from stay filed by reverend
12 feinstein. We were here on that a month or so ago
13 and set it down for a preliminary hearing today.
14 We're trying to work through sometiming of when
15 certain testing might occur with respect to the
16 products involved in this accident. We're working
17 with counsel to try to figure out what makes sense
18 in that regard. What we have agreed to do, Your
19 Honor, is simply combine the preliminary and final
20 hearing for the January 29th hearing date.

21 THE COURT: All right.

22 SPEAKER 3: Good morning. Lisa Hudson of
23 sands anderson here on behalf of the funches family.
24 Actually, this court joined orally at our last
25 hearing the ollaway family. So I'm here on both
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1 regards. Doug is correct. We did agree to set this
2 for final hearing 1-29 at 10 and are working to
3 resolve as much as possible. Your Honor, if I might
4 have a brief indulgence, I have with me ash Lee
5 Burgess today of my firm who has been admitted
6 recently to this court and wanted to welcome him and
7 introduce him to the bar. He was admitted to
8 practice in 2004 and will be joining the fun of
9 LandAmerica, circuit city with the business and
10 bankruptcy team at sands anderson.

11 THE COURT: Good morning and welcome to the
12 court.

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13 SPEAKER 3: Thank you.
14 MR. FOLEY: Your Honor, the next item on the
15 docket is item number 4. This is a debtor's motion
16 to retain D J M realty services, LLC. We are
17 working through an informal response filed by the
18 committee. We think we can work it out. We
19 actually will spend the afternoon -- what's left of
20 the afternoon -- to try to work it out with them and
21 see if we can't submit an order without actually
22 setting this down for another hearing; however, if
23 we can't resolve it in the next day or so, Your
24 Honor, we would contact the court to have it set at
25 the next available hearing date. But we think we
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1 can work through it today.
2 THE COURT: Very good.
3 MR. FOLEY: Your Honor, item number five
4 is -- and section relate to stipulation that we have
5 chase credit card, chase bank U, S A, which is the
6 issue of a co-branded credit card for the circuit
7 city stores. Your Honor, most of the the relief
8 that we think the stipulation provides for is
9 consistent with a customer programs Your Honor
10 entered on the first day. Basically, what is being
11 protected here is chase's rights with respect to
12 settle and recoupement as to any returns, charge
13 backs adjustments and other credits related to card
14 holder agreements. What the stipulation also
15 provides is for a reserve that they can establish

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16 with respect to money that they would otherwise have
17 to pay us in January. There's been no objections to
18 the form of the motion and -- acceptable, we'd like
19 to submit it to the court after the hearing.

20 THE COURT: It will be received.

21 MR. FOLEY: Thank you. With respect to items
22 number 7 and 8, Your Honor, these are applications
23 with respect to E N Y that further clarifies the
24 scope of their tax advisory services that they're
25 provide together the company, as well as the
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1 retention of K P M G which is the company of
2 auditors. They also provide certain advice with
3 respect to the tax refund claim with the IRS.
4 We've spoke tone the office of the United States
5 trustee and we'd like to submit orders after for his
6 endorsement.

7 THE COURT: It will be approved.

8 MR. FOLEY: Thank you, Your Honor. With
9 respect to item number nine, Your Honor, this is our
10 motion to retain certain professionals in the
11 ordinary course of business under 327 E. Your
12 Honor, there's approximately 35 professionals. We
13 tried to keep the list as small as possible. There
14 is a procedure set forth in there as to how they get
15 compensated. There's a cap on monthly spend with
16 respect to these professionals. There are
17 procedures for amending it to the extent we need to
18 add professionals or take some off. Again, we've
19 consulted with the office of the United States

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20 trustee. There's been no objection to this motion.
21 We'd ask the court to enter the order we submit
22 after the hearing.

23 THE COURT: It will be approved.

24 MR. FOLEY: Your Honor, item number ten is
25 our motion to reject certain personal property
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1 leases pertaining to vehicles and equipment, at
2 least store locations that are going through the
3 closing process right now that are no locker
4 necessary. Your Honor, there's been no objection to
5 the motion. We would ask to be able to submit an
6 order. One clarification with respect to the order
7 that we'll be submitting, Your Honor. We did agree
8 to carve out certain leases pertaining to General
9 Electric. So the order that we submit will not go
10 forward with this motion as to them.

11 THE COURT: All right. With that amendment
12 it will be approved.

13 MR. FOLEY: Your Honor, Mr. Galardi will
14 address items 11 through 17 on the balance of the
15 agenda.

16 THE COURT: All right. Thank you, Mr. Foley.

17 MR. GALARDI: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. GALARDI: Your Honor, I'll take 11 and 12
20 together, but I want to do a step back. This is the
21 time and place for the final hearing on the the
22 debtors' proposed financing order. Your Honor, we

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23 received a number of objections from many many
24 parties, including landlords and other taxing
25 authorities. My understanding is we have resolved

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1 all of those objections. I'll never know until
2 somebody comes up behind me. But we believe we have
3 resolved all of them. One of the most significant
4 objections, Your Honor, is to sort of put it in the
5 context was the one that was not filed by the
6 creditors' committee. I know Your Honor was aware
7 of that. Your Honor, first, business has been --
8 and Mr. Cool Um is in the courtroom today and if
9 allied as a witness would testify to a number of
10 facts that I am going to layout for Your Honor so
11 Your Honor understands the need for the final order,
12 as well as the need for the document to be filed
13 under seal, as well as the amendments so that we can
14 put that in context.

15 Your Honor, just briefly, since entering into
16 the bankruptcy case, the debtors' performance, as I
17 think all retailers have, has opinion off
18 significantly. The original budget had sales off 20
19 percent and they've gone more to 43 to 48 to 50
20 percent. Unfortunately, the business is not
21 performing for the holiday, probably as -- best buys
22 and our competitors having similar circumstances.

23 In that context, and with performance falling
24 off, the other aspect of the model that Your Honor
25 had seen was that in January we were hopeful that

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1 vendors would come along and provide certain trade
2 terms. They have been slow coming. Some vendors
3 have supported, some have not. Our projection of
4 what we hoped to do to get through what I called a
5 bridge to somewhere, a sale, an exit, a vendor
6 supported plan. And the idea was to give us roughly
7 60 days to a date that we all targeted as January
8 16th whereby we would either get a subordinated
9 facility of about 75 million dollars. There was
10 some discussion of that, or come up with a vendor
11 plan or something like that.

12 The per though performance is off, it is
13 still our hope that we continue to do that. The
14 committee expressed its concern in an informal
15 objection to us that they gave us a draft for. And
16 I'll say 7 of the concerns that they had, there were
17 probably more than that, but there were 7 major
18 concerns. First, Your Honor will recall that we
19 rented into an agreement that the first day rolled
20 up all of the pre petition debt into a post petition
21 debt and the debtors had taken the condition that
22 that was appropriate under the circumstances. Both
23 for practical purposes and because we believe the
24 vendors were over secure. Notwithstanding that, the
25 committee had an objection to the roll up and we had

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1 some stand still agreements during this period of

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time with respect to that.

The second, Your Honor -- and I think I emphasized this in the first day, and it was first meeting with committee -- I guess the slogan for the case is you're paying 30 million dollars for a 50 million dollar availability. They had expressed the same concerns. We've had our stories about that and why it isn't exactly that, but that was a second concern that the committee had expressed loud and clear.

Third, the committee -- as committees generally do -- wanted a longer investigation period with respect to evaluate the security interest of the bank group, the time periods, and things of that sort. Obviously, every committee has a concern with the at the time ors 506 C waiver which was included in it. In addition, especially in 2 context of the roll up, the committee had expressed its concern that the banks were taking not just the collateral they had pre petitioned, but expanding their collateral to include such things as lease proceeds, if, F F and E, Canada, and that was a concern that the committee had expressed. And so have other people, but I think it's easier to focus on that.

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In addition, as we had talked about the first day, the committee had concerns about the need to have a 75 million dollar sub debt facility; and, I object deed, what that facility would be could itself hamper trade terms because you would just

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6 simply further subordinate ordinary trade credit.
7 There was that concern. Finally, the committee also
8 had concerns about the timing of bid solicitations
9 and the plan. It was a relatively short time frame,
10 and we had got eastbound, since the committee was
11 formed, certain indications they would be willing to
12 consider not only the initial -- we had meetings in
13 New York with the committee about that and
14 unfortunately we didn't come to an agreement
15 initially. So we began discovery I guess it was
16 last week again adjourning off the committee's
17 deadlines to file an objection.

18 Your Honor, with the amendments before Your
19 Honor today that we have filed, as well as the
20 motion under seal, we have resolved the committees'
21 objections; again, as any resolution, obviously,
22 they wished for some more things. The bank wished
23 for some less things or more things. But we think
24 we've resolved a fair settlement that's embodied in
25 the amendment.

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1 In particular, Your Honor, from a factual
2 standpoint as Mr. Cool would testify, as we sit
3 here today, whether we had done a first day roll up
4 or a roll up up to this hearing, by now all of the
5 pre petition debt would have been rolled up. So
6 that issue sort of died of its own accord, although
7 the committee had retained its rights to always
8 challenge that roll up. Today we are not having

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that contested.

Your Honor, with respect to the cost and availability factor, and given the performance, this was a negotiation and the committee has now agreed and we would still seek the approval of -- and it was still approved on the first day -- the fees paid; however, Your Honor, we believe we now have some additional substantial availability, though not obvious, what has been removed is the minimum availability covenant N. the original DIP financing agreement, as of December 20th, we had to have minimum availability of 75 million dollars. The next two weeks were 50 million dollars and then at a low in the week of January 35 million dollars. So essentially whether you won't want to call it a block or a covenant, we would have butted against those terms. The banks have agreed in the amendment

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we have put forth and for which we seek approval today that those covenants to not apply. There's still the 75 million, but there's not the 75, 50 and 35 block. In addition, Your Honor, the banks have consented to extend the investigation period to March first, 2009. The committee has agreed that they do not object now to the 506 C waiver. And importantly, Your Honor -- and this is good for the estate -- the banks and the committee and we have agreed that there will be no liens granted on the the F F and E that was originally part of the additional collateral and bootstrap collateral that

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13 the banks were taking. In addition, there is a
14 sharing of Canadian proceeds between this estate and
15 the the banks. The banks also took a lien on
16 Canadian assets. It will have no affect on how the
17 mechanics work in Canada. It only has an effect for
18 this estate and what the proceeds from any sale or
19 proceeds that are to go to pay down the debt will
20 have with respect to this estate. And then finally,
21 as Your Honor knows, we have addressed which he can
22 check various timing issues with respect to where
23 this business is going. As I had mentioned -- and
24 the reason we had filed the motion under seal -- is
25 that we are seeking a bridge to somewhere. We are

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1 in negotiations as Mr. cool Um calls the witness
2 will testify, we continue to pursue a plan with
3 vendors, although that has not gone as fast as we
4 would like it to. We are, in fact, pursuing still
5 sale of all of our assets. And so, we continue to
6 pursue that. As part of this, we have asked now for
7 Your Honor to approve the amendment that sets up
8 various time lines for achieving certain of our
9 goals with this re structuring. We have asked Your
10 Honor to grant a motion to file an amendment, aside
11 letter under seal. We would ask Your Honor to do
12 that. That's obviously, as Your Honor has probably
13 read, it's confidential and sensitive information,
14 and may affect the ultimate value that we get for
15 these assets. So we think it's important that that

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16 motion be granted. And in addition, Your Honor, we
17 no longer face that hurdle as the quit proquo for
18 that sped you'll. We no longer face that January
19 16th or 17th deadline to have a subordinated loan
20 facility. So we believe that with those amendments,
21 Your Honor, two things are very important. One that
22 the company will have adequate availability to be
23 able -- that we have adequate availability to get to
24 the 16th; and, indeed, maybe even later than the
25 16th, to be able to continue to explore the

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1 restructuring alternative.
2 Two, that we have a consensual DIP, except
3 for I guess I've been passed a note that one of the
4 objections may still be outstanding, but it doesn't
5 go to these terms -- but we have a consensual DIP
6 that the committee and the banks and we have all
7 agreed to. We have a structure and a time frame for
8 proceeding with the restructuring of these cases,
9 all of the avenues that we are going down; and that
10 we have adequate availability. And, indeed, Your
11 Honor, without approval of the facility today, we
12 would have no further financing. And there's
13 clearly an immediate need for financing as we make
14 purchases every day, we pay bills every day, we pay
15 employees every day. So we would face -- though we
16 don't need to say immediate and irreparable harm in
17 the context of the final order that the financing is
18 in the best interest of the creditors and estates --
19 we believe that it is supported by the committee.

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20 And the bank group has negotiated in good faith with
21 respect to the modifications that it has made.
22 Again, Your Honor, we had a meeting -- and I think
23 it's important to point out that many of the issues
24 require 100 percent lender consent. So that is a
25 very difficult thing in this time to have financing.

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1 So we are happy to still have that financing. And
2 then with the help of the required lenders led by
3 the agent B of A, the elimination of that minimum
4 availability or clean down covenant has
5 significantly given us more certainty that we'll be
6 able to explore our restructuring alternatives
7 through the middle of January and make some
8 determination as to where this case is going.

9 Your Honor, the one objection that is out
10 standing here and we may just need a little bit more
11 time is the objection of Navarre, who is a
12 consignment vendor. And we don't dispute that there
13 are consigned goods. They've also made a motion for
14 adequate protection. We may be able to resolve that
15 separately. I don't think it goes to we need a DIP.
16 It's more it goes to what adequate protection can be
17 provided through a consigned lender in the modern
18 age of centralized cash management and reserving
19 rights, we propose a stipulation.

20 MR. GALARDI: Your Honor, I could certainly
21 put Mr. Cool on the stand to address that, but I
22 think if called as a witness, he could verify the

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23 facts set forth in the final order. It is the
24 result of arm's length negotiations. I think we can
25 rest on the record. And I don't know if there's

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1 parties who have an objection, or other people who
2 have comments. I leave it to Your Honor as to how
3 you'd like to proceed with the rest of the final DIP
4 hearing.

5 THE COURT: All right. Thanks. Does any
6 party wish to examine the proffered witness for the
7 debtor?

8 All right. The proffer will be accepted.
9 Does any party wish to speak in opposition to the
10 motion to approve the DIP financing?

11 SPEAKER 3: Your Honor, if I may. Briefly,
12 I'd like to be heard on this. Ken Coleman of Allen
13 and Overy. We represent Alvarez and Marxel, the
14 monitor appointed in the Canadian proceeding. I
15 don't have an objection, per se, but I do have some
16 comments that I'd like to express to Your Honor and
17 have on the record.

18 As I indicated at the last hearing, you know,
19 we do appreciate the difficult circumstances of the
20 U.S. company and the difficult retail environment
21 and the pressure that everybody is under in this
22 case to try to effect a restructuring. The fact of
23 the matter is that the monitor in the Canadian
24 proceeding is the only party that can consider the
25 interests of the Canadian unsecured creditors

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1 without any conflict of interests. The Canadian
2 company intertan does not have the ability -- does
3 not have an independent board of directors that can
4 look solely to the interest of the Canadian
5 creditors as a function of the corporate governance
6 of the system. And those are the facts we have.
7 That's why there's additional pressure on the
8 monitor to pay attention to the interests of those
9 creditors. Yet, the monitor has been excluded from
10 this process that has led to this amendment. I
11 think Your Honor is aware of the extraordinary
12 nature of the relief that was available in Canada in
13 connection with the post petition financing. For
14 the first time the Canadian subsidiary was joined
15 with the U.S. parent in terms of its assets being
16 directly available to support this financing. So
17 therefore, what occurs in the U.S. does have a
18 direct impact on the Canadian creditors.

19 Again, we appreciate that the partys are
20 trying to accomplish a number of things here in a
21 fairly short order, in a very difficult environment.
22 We think that this amendment -- while we appreciate
23 Mr. Galardi's comments that there should be no
24 impact on the Canadian creditors, this amendment
25 specifically in section 5 B, which we only received

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1 for the first time yesterday afternoon, doesn't say

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2 that. It suggests that after -- it says that after
3 payment of specific charges set forth in the
4 Canadian initial order, 50 percent of the proceeds
5 go to pay the DIP loan, and the balance goes to the
6 U.S. estate. Now, there may well be, depending on
7 how the facts unfold and how the Canadian sale
8 process unfolds, there may well be Canadian unsecured
9 creditors who are cut out of those proceeds. Now,
10 if that's not the intention, that's fine. And there
11 are words that can be used to fix that. But my
12 point in rising today, Your Honor, in addition to
13 express our concern about this process, my point in
14 rising specifically is to suggest to Your Honor that
15 matters pertaining to this amendment, matters that
16 affect the priorities of the Canadian court order
17 and the application of proceeds of the sale of
18 Canadian assets ought to be addressed in the first
19 instance by justice Morawetz in Canadian court, and
20 that this court should not today approve the
21 amendment in those respects as they affect Canada.

22 Justice Morawetz has been alerted to the
23 hearing today and to these provisions, and it is my
24 understanding that a hearing is being scheduled
25 before him tomorrow to consider this. And what we

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1 don't want to create is a sense that this court has
2 somehow approved matters that relate to Canadian
3 priorities and the application of Canadian assets
4 when, in fact, out of deference to the Canadian
5 court, whose order is really at stake here, that

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6 court would first consider those issues.

7 And frankly, there are concerns in Canada
8 expressed last night and this morning about various
9 representations that were made to obtain the
10 financing in Canada on the first day, that the terms
11 were in inviable, that there was no time to consider
12 alternatives. And indeed there have been
13 substantial changes and substantial negotiations
14 over the past six weeks or so in which we just have
15 not been involved. And we think that --
16 understanding the circumstances that the partys are
17 under -- we think that we need to be involved in
18 that process so that we don't confront situations
19 where we're presented at the last minute with what
20 appears to be a fait accompli, which has a very
21 direct and material impact on Canadian creditors.

22 THE COURT: All right. Thank you.
23 Mr. Galardi?

24 MR. FOLEY: Yes, Your Honor. Two things. I
25 think this might be a language issue. First, Your
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1 Honor, I want to be clear. We are not asking Your
2 Honor to do anything to change any order -- the
3 financing order in Canada, nor are we saying that by
4 doing this order we're going to turn around in
5 Canada and say, well, this court approved it. That
6 wasn't the intention of this.

7 Your Honor, there is an order -- and Mr. burr
8 man is familiar with it, and I am somewhat familiar

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9 with it -- in Canada whereby there is a charge, a
10 payment and then there is some money that's been set
11 aside for the unsecured creditors in cab can and
12 then the banks would get their rights which were
13 agreed to in the order that is before Judge
14 Morawetz. All this order says, that when the banks
15 begin to take on that second part after the charges
16 and everything goes, is that they're sharing 50
17 percent of that with this estate. It's not changing
18 anything in that original order, nor was it our
19 intention to do so. Mr. burr man can certainly
20 describe that. If the language doesn't make that
21 clear, I understand. Again, I'm not standing it on
22 the fact they clearly have a voice in this case.
23 They're not a party in interest in the sense of
24 stand agency a creditor, but I do want to make it
25 absolutely clear: We are not asking this court to

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1 say this is an order and has binding effect on
2 Canada or changes anything about the Canadian order
3 whatsoever. That is not our intention here. And we
4 can work through with the monitor in this language.
5 Obviously, I wasn't aware of a hearing tomorrow.
6 But the idea is whatever the banks had with respect
7 to the Canadian collateral, all it's done is said,
8 We'll give 50 percent back to the estate. No change
9 of that Canadian order.

10 THE COURT: After payment of Canadian --

11 MR. GALARDI: After all of the agreed -- in
12 the Canadian first day order and the other financing

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13 order there was charges. There was this. And there
14 was a separate negotiation with the monitor to allow
15 a pot of money remain before the banks collect on
16 their lien above that for the unsecured creditors.
17 We've not altered that bucket whatsoever. We've
18 simply given the banks, which the committee pointed
19 out, the banks were getting apart of their
20 collateral and they've agreed to share. That's
21 essentially what this provision of 5 B was intended
22 to capture.

23 THE COURT: All right. Thank you.

24 SPEAKER 3: Your Honor, I appreciate those
25 comments, but just so I'm clear: The Canadian order
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1 has six charges, or as we would understand it,
2 priorities or carve outs. Our difficulty is that
3 there may well be Canadian unsecureds who are not
4 paid after those six priorities are dealt with.
5 There are caps on each of those six priorities.
6 What this language purports to do is that after
7 you -- after the proceeds fall through that
8 waterfall of six priorities, the banks get half of
9 the remaining proceeds, the DIP lender gets half of
10 those proceeds. And the U.S. estate, presumably for
11 the benefit of the U.S. unsecureds, gets the balance
12 of the proceeds. So our concern is not the six
13 prior claims, but rather the Canadian unsecureds who
14 would be paid if at all from the Canadian estate.
15 So if you will the 7th bucket. That's the problem

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16 with this.

17 Now, we're happy to work on the language for
18 the amendment because the way it's drafts, it talks
19 in terms not of a sharing of lien or claim, but
20 rather a sharing of proceeds. So if a sharing of
21 proceeds is not the intention, but rather an
22 assignment of the lien or an assignment of the
23 claim, you know, we can work with that wording. but
24 just so that I'm clear with Your Honor, our
25 difficulty is if you will the 7th bucket, not the
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1 prior six.

2 THE COURT: All right. Thank you.

3 SPEAKER 3: Your Honor, David Burrman for
4 the DIP lenders. What we were trying to accomplish
5 here, Your Honor -- just so you understand the
6 buckets that have been referred to in a little more
7 detail -- is there are some priority Canadian
8 claims, administration expenses, directive charges
9 which will be paid first from the collateral. The
10 lenders have also made a direct loan to the Canadian
11 borrower to fund its operations. After those
12 priority charges are paid, the direct loan gets
13 paid. That's really the first four levels.

14 The fifth level was a carve out that was
15 requested by counsel in Canada of 25 million dollars
16 for Canadian creditors to make sure that the
17 Canadian creditors had some recovery before the
18 cross guarantee of Canada was to apply and the money
19 to come to pay the U.S. debt after a second hearing

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20 in December fifth, that carve out was increased so
21 it's 25 million, plus any unused portion of the
22 first priority carve out. So it could potentially
23 be 40 or 45 million dollars. So it's after the
24 carve outs, the banks paid its direct loan. The
25 court order says at that point this time the bank
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1 can get paid on its cross guarantee with any
2 remaining proceeds, if any. And in our negotiations
3 with the committee and the debtors, what we were
4 saying is, okay, we're entitled to all of those
5 proceeds until the U.S. debt is paid off. What
6 we'll do is we will -- rather than applying them all
7 to the U.S. debt, we'll leave some in the estate for
8 the creditors.

9 So we're not changing the order. We're just
10 saying the money we get, rather than applying it all
11 to the debt, some is going to stay in the estate.
12 That is really what we're trying to accomplish here.

13 MR. GALARDI: Your Honor, let me also put my
14 color on it. This is really a Marshaling argument
15 in some -- and this was one of the committees
16 concerns. The banks also always have a lien in
17 inventory. We believe the inventory will be
18 sufficient to pay it off. In this uncertain
19 environment, they took a couple of other pots of
20 collateral, including the Canadian collateral. As
21 Mr. Burman has just described, nothing has changed
22 as to what the banks have taken. But the committee

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23 was concerned that, well, okay, you really to want
24 need that extra collateral if you're going to be
25 paid by the inventory. So we had along discussion

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1 back and forth as to what kind of collaterals --
2 where would you first look. What Mr. Burman and the
3 committee and the debtors have agreed is essentially
4 we're not going to look to the F F and E. You'll
5 still look to the inventory. You always had,
6 because that was the deal -- I understand the
7 monitor may not like the deal that was originally,
8 thinking there may have been more for them up this.
9 But there's an order up there that says the banks
10 have 100 percent of those proceeds after the the
11 charges. What Mr. Burman has con to resolve a
12 committee objection here, which we think is
13 perfectly appropriate is says that's fine. If I
14 took 100 percent, my debt goes down 100 percent. If
15 I took 50 percent, my only does that. whether it
16 goes directly to pay down the secure error whether
17 it comes into this estate as free cash for either
18 the unsecureds or administering of claims is really
19 largely irrelevant it felt money was going to
20 benefit this estate in either way, which is why we
21 think this particular B, one is very critical to us.
22 Two, it's critical to the committee because it was a
23 weigh to involve essentially a Marshaling argument.
24 Since the estate had already negotiated through
25 Canadian counsel and with the Canadian order they

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1 had this above the 25. We don't think this' a
2 change. We understand they may go back to court
3 there and say we didn't know there was something
4 more we could have gotten, which is what this
5 argument is about. Canada is saying we took 25 but if
6 the bank is willing to give 50 away, why couldn't we
7 get 35 or 45. I understand that they may not like
8 this result, but that's not a reason to stop this
9 amendment. It's quite consistent with the order.
10 They can make the argument in equity up there. I'm
11 not asking Your Honor to say, Judge Morawetz, don't
12 decide this issue. Don't look at this issue.
13 You're free to look at it. But this is entirely
14 consistent with the order. And if the monitor has a
15 problem with the deal they cut because they thought
16 maybe I could have gotten some more, that can be
17 brought before Judge Morawetz. But this is really
18 still estate property. Whether it goes to pay the
19 debt directly or it becomes funds and we make a
20 marshalling argument is really irrelevant. They
21 were going to this estate or for the benefit of this
22 estate under the Canadian order.

23 THE COURT: All right. Thank you.

24 SPEAKER 3: Your Honor, I'm happy to leave
25 this with Justice Morawetz for tomorrow, but that is

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1 not -- that is not our position. We're not

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2 hearsaying there's more to be had; we'd like to have
3 it. We disagree that the wording in this amendment
4 accomplishes what Mr. Galardi says it accomplishes.
5 We do believe that this wording does purport to
6 affect the priorities in the initial order, and we
7 think that justice Morawetz should have first crack
8 at that issue.

9 THE COURT: I certainly agree that the
10 Canadian court should administer the property of the
11 Canadian company. But as I understand the way that
12 this is working, these are the proceeds that come
13 from the order that's already been entered in the
14 Canadian court governing that. It's just a matter
15 of how it flows from that. And if the court amends
16 the order in Canada, then, you know, this court
17 won't interfere with that. The Canadian court can
18 certainly do that. Check he can.

19 SPEAKER 3: Well, Your Honor, part to have
20 problem with this wording is if 50 percent to have
21 proceeds of the the sale to have Canadian assets
22 were sufficient with other recoveries to pay off the
23 balance to have loan, the remaining 50 percent would
24 none the less go to the U.S. estate for payment of
25 the U.S. unsecured creditors; where as under the

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1 previous regime, those funds would go to the
2 Canadian estate and be distributed to the U.S.
3 estate as an equity distribution if at all.

4 THE COURT: Hasn't the lender should assigned
5 50 percent of its lien to this estate.

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6 SPEAKER 3: Again, Your Honor, this doesn't
7 say that. This talks about how the the proceeds of
8 the the sale will be distributed. And it talks
9 about 50 percent of the proceeds of the sale going
10 to the DIP lender, and the remaining proceeds of the
11 sale going to the U.S. estate. This doesn't have
12 any effect on the DIP lender's lien or claim. It
13 just says you'll get 50 percent to have proceeds.
14 Now, they have other source of recovery. Undoubt
15 itly there is a Marshaling argument that relates to
16 all of this, which is unavoidable once you have
17 co-borrowers and cross collateralization. But the
18 problem with the focus on pure proceeds rather than
19 claim would be one thing if the lenders were saying
20 we are assigning to the U.S. estate 50 percent of
21 our lien. But that's not what they're doing.
22 Again, Your Honor, I'm happy not to be the tail
23 wagging the dog on this issue here. That's not what
24 this wording says.

25 THE COURT: Have you proposed language to
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1 Mr. Galardi that would be acceptable.

2 SPEAKER 3: That's part to have problem with
3 the process, Your Honor. We haven't had a chance
4 to. We just got this yesterday afternoon despite
5 requests previously to be allowed into this process.
6 We're happy to propose language.

7 MR. GALARDI: Your Honor, there's a simple
8 answer, I think, to do thing that. Clearly, a

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9 sentence in our order that says nothing is intended
10 by any of the amendments to modify or change in I of
11 the the terms of the Canadian order makes this
12 language largely irrelevant to them. And that's
13 what I'm going to suggest is ultimately a paragraph
14 in here.

15 THE COURT: And that would be acceptable to
16 the court. I think that --

17 MR. FOLEY: Then we don't have to -- we can
18 work on language. But as long as this order says
19 clearly we're not trying to amend the Canadian order
20 by the way of book door or otherwise by amendment or
21 otherwise, I think this objection then can be over
22 ruled. And judge Morawetz can look and have
23 whatever -- if it alters it, he can interpret that.
24 I think that's totally appropriate. Thank you.

25 SPEAKER 3: Your Honor, just in terms of
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1 clarification as to what the DIP lenders were
2 believe they were agreeing to is they were given 50
3 percent of what we were entitled to receive from
4 Connell after the direct loan and other charges to
5 the estate. Burman. So in the example that was
6 given, if we only need 50 percent to have
7 proceeds -- we would only need 50 percent to have
8 proceeds to satisfy the 50 percent. The other 50
9 percent stays in can condition and we take the 50
10 percent we receive and split it with the estate. So
11 we're not trying to -- or at least the DIP lenders
12 aren't trying to get more than we were otherwise

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13 entitled to under the order. It's just how were
14 those proceeds used. We're basically agreeing to
15 release part of our collateral to the estate.

16 THE COURT: All right. Thank you.

17 MR. FEINSTEIN: Your honor, reverend fine
18 Stein for the official creditors committee. I can
19 confirm what Mr. Galardi and Mr. Burman said about
20 the nature of negotiations in that under the interim
21 DIP under the DIP financing agreements, the lenders
22 were to get substantial additional collateral -- new
23 leases, a pledge of the unpledged entered in the
24 Canadian subsidiary, and F F and E. As a part of
25 the horse trading of negotiating a consensual DIP
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1 resolution -- as Mr. Galardi pointed out -- one of
2 the items that was ceded by the bank, as Mr. Burman
3 described it, was giving up half of what they were
4 entitled to under the Canadian order.

5 So there is no -- let me confirm, there is no
6 effort to modify the Canadian order at all. And
7 frankly, I'm quite concerned to hear that there's
8 some emergency proceeding in Canada to amend that
9 order in a way that might undermine the deal that we
10 struck here today, essentially on no notice to this
11 creditors' committee, which would be fundamentally
12 affected by any change. I just want to express that
13 concern on the record, and ask that we be included
14 in any proceedings of this type that go forward in
15 Canada tomorrow.

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16 With respect to the remainder of the
17 resolutions, let me just -- I'll confirm what
18 Mr. Galardi laid out, that the efforts by the
19 committee to negotiate -- and we did, as Mr. Galardi
20 said, meet in New York with the banks and with the
21 debtor, and have engaged in fairly round-the-clock
22 negotiations over the last several weeks -- have
23 resulted in a number of important protections from
24 the committee's standpoint.

25 First, with regard to the roll up, there is
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1 now language in the final order that makes it clear
2 that if any successful challenge is brought, that
3 the roll up will be rolled back to the extent that
4 there are defects in the liens and things like that.

5 We do have some concern about the signs of it
6 being relative to availability with the elimination
7 of the minimum availability covenant. There is now
8 substantial more liquidity for the debtor to operate
9 as we go forward.

10 The challenge period has been moved out so
11 that we can all focus on restructuring this business
12 and maximizing value for creditors.

13 The additional collateral issue, again, has
14 been addressed by the ceding of half the bank's
15 recovery out of the Canadian proceeding, as well as
16 by not having a lien on the FF and E.

17 We also thought it was important to eliminate
18 the 75 million dollar sub debt facility requirement.
19 That would have created a number of issues. That's

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20 gone.
21 Lastly, two points that Mr. Galardi didn't
22 raise: We made it clear in this order that the
23 super priority claim that's being afforded to the
24 banks cannot be satisfied out of avoidance actions
25 or the items of collateral that have been freed up,
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1 if you will -- the Canadian collateral, the F F and
2 E. And finally, we added a reporting provision for
3 the payment of banks' professional fees, that they
4 provide invoices to the committee of the U.S.
5 creditors. Thank you.

6 THE COURT: All right. Thank you.

7 SPEAKER 3: Just one last point, Your Honor,
8 if I may.

9 THE COURT: Yes.

10 SPEAKER 3: I'm wearing out my welcome. I
11 read body language almost as well as English.

12 There's no intention to create emergency
13 hearings to anyone's surprise. If we had been
14 involved in the process, all of this could have been
15 avoided. Notice of that hearing is going out today.

16 One issue that we think is enormously
17 helpful, one way to approach these problems that we
18 think is enormously helpful is if the courts are in
19 communication with each other. We're happy to
20 provide your chambers with Justice Morawetz's phone
21 number if Your Honor feels that a conversation of
22 that nature would be helpful to get us over this

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23 hump.

24 THE COURT: All right. Thank you.

25 SPEAKER 3: We'll do that today. Thank you
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1 very much.

2 THE COURT: I'm going to request Mr. Galardi
3 include the language that you just mentioned in the
4 order to clarify that -- you know, affecting any
5 order that's been entered in the Canadian court.

6 With that, did any other party wish to be
7 heard on the motion to approve the DIP financing?

8 SPEAKER 3: Good morning, Your Honor, Alan
9 notfeld on behalf of Navarre. We filed an objection
10 to the DIP order, and then we also filed a motion
11 for adequate protection. The relief in the motion
12 and the relief requested in the objection are kind
13 of parallel. So just wanted to get an affirmative
14 motion before the Court, and in particular in light
15 of the fact that the DIP hearing was continued last
16 time, and we didn't have an opportunity to be heard.

17 The DIP order does now provide for a carve
18 out for goods that are not properly in the estate.
19 And that would include goods such as the Navarre
20 property that has been delivered to the debtors on
21 consignment. We appreciate that, but in our minds
22 that's the easy part. The more difficult part is
23 what happens with the proceeds from the sale of
24 those goods? And the DIP order in our minds does
25 not sufficiently address those proceeds. And as a

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1 result, we feel effect of that is that some right
2 that is Navarre has under the bankruptcy code;
3 namely under section 363 C are taken away because
4 when the debtors sell the consigned goods and they
5 receive the proceeds of those, the proceeds get
6 mixed in with the debtors' accounts which are
7 subject to the blank blanket lien by the DIP lenders
8 and Navarre's rights to segregation and its other
9 rights to proceeds can be lost.

10 As briefed in our papers, Navarre and the
11 debtors are consignment -- under the U C C that
12 consignment agreement is a check he can tame. I
13 won't go into all the specifics but we feel we've
14 sufficiently laid out the steps we took to secure
15 that security interest. I note the debtors in the
16 their sponsor no other party has October today the
17 validity of the steps that were taken, and as such,
18 the validity of the consignment lien and the
19 consigned goods -- and I also note that that's
20 sufficiently covered in the order right now. With
21 respect to the proceeds, we also look to the U C C
22 and the U C C basically grants a lien on proceeds
23 that are from the sale of inventory that's subject
24 to a purchase money security interest to the extent
25 they're identifiable. And we think there is a

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1 slight difference here between the goods on

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2 consignment that were sold pre-petition and the
3 goods on consignment that were sold post petition,
4 but they ultimately get to the same place. With the
5 goods pre petition, essentially we would have a lien
6 on the proceeds to the extent that those proceeds
7 are identifiable. And as briefed in our papers, the
8 courts look at the lowest balance. It appears that
9 the burden here is initially on the secured party to
10 establish that where funds were co-mingled -- which
11 we suspect was the case here -- that they can be
12 traced, applying the lowest intermediate balance
13 test and the minimum information available to us.
14 The total dollar value of these goods is about 2.3
15 million, and the debtors' cash balance on hand
16 appears to have dropped no lower than 90 million
17 based on their public filings with the SEC. At
18 times they seem to be closer to 300 million in the
19 past year. It's really difficult for us to pinpoint
20 exactly what was on hand as to have petition date,
21 but we think it was well in excess of 2.3 million.
22 And we think that we've, at a minimum,
23 demonstrated -- established a prima facie case that
24 there are identifiable proceeds from the sale of
25 Navarre's consigned goods. We also note that there

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1 was no objections to those claims in our motion.

2 For post petition, the analysis is slightly
3 easier. Basically, when the goods are sold and the
4 proceeds hit the debtors' account, that the
5 moment in time they're identifiable proceeds; and as

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6 such, they're Navarre's cash collateral and the
7 section 363 kicks in and Navarre would be afforded
8 the rights under the bankruptcy code. Either way,
9 the outcome is the same. To the extent you have
10 your identifiable pre petition proceeds or your post
11 petition proceeds it's cash collateral and cannot be
12 used without Navarre's consent which they have not
13 asked for and we have not granted or without the
14 court order upon a motion and notice of hearing.
15 And they have not done that, either.

16 So basically, what we're left with is a DIP
17 order that does sufficiently establish that the
18 debtors aren't trying to take any -- that the DIP
19 lenders, sorry, are not trying to take any liens in
20 consigned goods. But it does not, in our minds,
21 sufficiently establish how the proceeds will be
22 treated. And the effect that we see it is that it
23 will enable the debtors to use cash collateral of
24 Navarre without consent, and in violation of the
25 provisions of the bankruptcy code.

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1 What we would ask --

2 THE COURT: But the order doesn't say that,
3 though; does it? The order doesn't say they can use
4 your cash collateral?

5 SPEAKER 3: The order does not say they can
6 use our cash collateral, but what's going to happen
7 is when the proceeds hits the debtors' accounts, the
8 orders which give the DIP lender the lien on all

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9 debtors' assets including the lien accounts is going
10 to in essence have that effect. Upon information
11 and belief, the balances of the accounts are going
12 to be swept on a daily basis and used to establish
13 the daily barring base. So those proceeds will then
14 be used to pay down the DIP lender's loan and they
15 will, in essence, be used.

16 THE COURT: So what does your objection go
17 to; the cash management system that they've got in
18 place, or does it go to the DIP financing order?

19 SPEAKER 3: Well, we don't have a problem
20 with the debtors obtaining their DIP financing. We
21 think that's in the best interest for everyone. We
22 would just ask that the order recognize that to the
23 extent that Navarre has a lien on the proceeds, that
24 it get afforded the proper treatment, and that those
25 proceeds get segregated in accordance with section

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1 363 C 2.

2 THE COURT: Well, given the cash management
3 system they have in place, how are they going to
4 segregate that? Because you're right. I mean,
5 everything is going to be swept into the centralized
6 account and such. But if there's a carve out for
7 goods that are not property of the estate, why can't
8 that just apply to the proceeds as well?

9 SPEAKER 3: Meaning that those proceeds would
10 go into a separate account?

11 THE COURT: No. It would just be deemed to
12 be not property of the bankruptcy estate, and not

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13 subject to the bank's loans. Doesn't that solve the
14 problem?

15 SPEAKER 3: I guess that solves the problem
16 as long as we don't -- as long as we can be sure
17 that we don't find ourselves down the road a month
18 or two from now and have there be insufficient cash
19 to pay those monies to the secured creditors in
20 liquidation scenario and basically have a situation
21 where the debtor hasn't already spent that money.
22 And that's the real concern.

23 THE COURT: Okay.

24 SPEAKER 3: So now just to address your
25 question on how it would work mechanically, I think
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1 with respect to the pre petition -- the sales from
2 the pre petition goods that were on hand as of the
3 the petition date, as well as the sales that have
4 occurred post petition up until today, that's just a
5 number. I would submit that you could just do a one
6 time payment into a segregated account and then
7 those funds are blocked and they're protected from
8 the debtors using them and from Navarre being
9 harmed.

10 With respect to sales going forward, we
11 understand that a is a little bit more challenging.
12 We're open to working with the debtor. It would
13 seem to me, give ten technology today that they
14 could run an inventory report at the end of every
15 day, and whatever the dollar amount of sales for

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16 Navarre's goods are, just have those funds be wired
17 over into the segregated account before the sweep
18 occurs, and then there would be no harm.

19 THE COURT: How are you paid right now.

20 SPEAKER 3: Right now under the
21 consignment -- well, I'm not sure how they're
22 getting paid right now. Prior to the petition date
23 the way it worked is they would sell the goods, and
24 then there would be periodic reporting on a weekly
25 basis, and then there would be payments that would
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1 follow the delivery of those reports.

2 THE COURT: And is that still happening?

3 SPEAKER 3: I don't know that it has happened
4 to the full extent. I think there have been some
5 small payments received, but they're not in line
6 with the dollar amount of goods that have been sold.

7 THE COURT: Okay.

8 SPEAKER 3: But again, we would submit that
9 segregation of the funds is the best method, and the
10 method that's mandated by the bankruptcy code to
11 protect Navarre's interest in the cash collateral.

12 THE COURT: Okay. Thank you.

13 THE COURT: Mr. Galardi?

14 MR. GALARDI: Yes, sir. Partially why I
15 thought we could resolve most of this was under the
16 Navarre agreement, the first thing I'd like to point
17 out is there is no obligation to segregate. So
18 although -- and we don't dispute the consignment.
19 Mr. fine Steen and I have already dealt with

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20 Panasonic. So what we had proposed to Navarre, I
21 think we have no problem with the post petition. We
22 give the weekly reports and although we give weekly
23 reports now and they get paid monthly we were going
24 to do what we do with Panasonic at the end of the
25 the week with the reconciliation pay with the

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1 proceeds and unwind the consignment. And that sort
2 of takes care of the monitored centralized cash
3 management because even though the funds are
4 collected we pay them regularly, do a
5 reconciliation. Any disputes that come back to the
6 court, we can unwind the post petition. We need to
7 fix what the petition date is.

8 Your Honor With respect to the pre approximate
9 petition that's where we have the biggest concern.
10 Clearly we sold goods prior to the bankruptcy. And
11 some of those goods have not been paid for. The
12 issue here is whether or not they actually have to
13 establish their burden or we establish a reserve for
14 that at this point we would object to the
15 establishment of a reserve. Rather, they should
16 have to carry their burden. As Your Honor knows,
17 one, whether we did a roll up or otherwise, those
18 proceeds have been in the account. That account was
19 paid off in full and re borrowed. So there is going
20 to be an argument of whether their lien attach order
21 they lost that lien by intermingling, and we
22 actually have to have a factual hearing with

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23 witnesses as to lowest common denominator if that's
24 the approach and whether those proceeds are still
25 their property. Clearly the unsecured creditors'

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1 committee, as they would have with Panasonic last
2 hearing want to weigh in on that issue as to whether
3 they've lost the lien because of comingling and
4 centralized cash management. Clearly, given that
5 they didn't require segregation of proceeds in our
6 agreement, clearly because we had a roll up and
7 clearly because we paid off our debts, there are
8 significant factual issues as to that.

9 So with respect to post petition, we have no
10 objection to going back to the petition date, doing
11 a weekly report and reconciliation and paying them
12 at the end of the week out of that. That eliminates
13 sort to have administrative insolvency the end of
14 the day problem. They don't have to hold the bag 30
15 days. We should do that reconciliation and turn
16 over the proceeds. With respect to the pre
17 petition, we oppose any request for them to get
18 adequate protection for pre petition. We don't
19 think they've established the fact of the lowest
20 common denominator. We'll gladly have a hearing on
21 whether or not those liens attached or whether those
22 liens are lost, and that money is simply property of
23 the estate as a result of events that have
24 transpired for the last 30 to 45 days. But I think
25 from a DIP perspective we can clearly give adequate

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1 protection in the form of weekly reports, and
2 turning over proceeds on a weekly basis subject to
3 reconciliation, with this court having authority if
4 there is a dispute about the reconciliations to come
5 back on an expedited basis to resolve any weekly
6 reporting or reconciliation issues.

7 THE COURT: And that's how you handled it
8 with Panasonic?

9 MR. FOLEY: That's exactly how we handled it
10 with Panasonic with everybody reserving their rights
11 to assert the pre petition claim is a secured claim.
12 And obviously, it's the least involvement by the
13 lenders because they don't want to have an argument
14 of conversion. So if it turns out they can prove
15 it, the lenders will make the payment. If it turns
16 out there is no liens, then it is property of the
17 estate. And that eliminates a lot of the cost of
18 having the lenders subject to a conversion. Nad
19 that's what we did with Panasonic with the
20 committee, Your Honor.

21 THE COURT: All right. Thank you.

22 MR. FEINSTEIN: Just briefly, Your Honor.
23 Yes, I want to confirm the committee would be
24 supportive of the arrangement going forward to sell
25 down the remaining consigned inventory, to have a

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1 periodic reporting, and to turn over the proceeds of

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2 newly sold merchandise on a rolling basis. But with
3 respect to the pre petition, we don't think that
4 Navarre has satisfied what will be a substantial
5 burden, and that they're not entitled to adequate
6 protection on that basis.

7 THE COURT: All right. Thank you.

8 SPEAKER 3: Your Honor, I would like to note
9 with respect to the proposal post petition payment
10 of proceeds, we discussed this with the debtor late
11 last week and over the weekend I have not been able
12 to confirm with my client due to their
13 unavailability over the weekend as to whether or not
14 that would be acceptable, but I believe it would be.
15 That seems like a fair arrangement. I would
16 certainly recommend it to them.

17 With respect to the pre petition, the seams
18 from pre petitioned goods, we would just note that
19 we did affirmatively tee this issue up in our motion
20 for adequate protection. This is really the first
21 we're hearing that -- you know, that people would
22 need -- you know, need to respond to and determine
23 whether or not Navarre has carried its burden with
24 respect to identifying those proceeds. We believe
25 at a minimum we've made a prima facie case on that

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1 issue. So we would submit that we have met our
2 burden there.

3 Notwithstanding that, we understand the fact
4 that everyone wants to get this order entered, and
5 that the committee may want some more time. And we

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6 would be willing to give additional time, perhaps in
7 the form of continuing the motion for adequate
8 protection as it relates to the pre petition
9 receivables until this court's next omnibus hearing
10 date; however, what we would like in the interim or
11 what we would request is that that sum of money just
12 get segregated and put aside pending the termination
13 so in the event we find ourselves in a liquidity
14 crisis one month from now we're not harmed because
15 we agreed to continue a hearing what we had already
16 kind of teed it up and properly noticed it, and no
17 one responded.

18 THE COURT: All right. Thank you.

19 The court will find that the proposal for
20 weekly reconciliations to provide adequate
21 protection to Navarre in connection with the post
22 petition DIP financing order. With regard to pre
23 petition amounts, the court will continue the after
24 protection issue to the next omnibus state. There
25 will be no requirement for the debtor to segregate

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1 funds, however.

2 SPEAKER 3: Your Honor, if I may just have
3 one clarification: To the extent that the motion
4 for adequate protection is continued with respect to
5 pre petition sales, and the the at the time or has
6 already responded, is there -- would there be an
7 expectation that there would be additional briefing
8 on the subject or could we just have that addressed

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at the the next --

10 THE COURT: Only if the parties want to have
11 additional briefing. I will read what you file.

12 SPEAKER 3: Okay. Thank you.

13 THE COURT: You'll need to be prepared to
14 present evidence, though.

15 SPEAKER 3: Okay.

16 MR. GALARDI: And Your Honor, that would
17 be -- the next omnibus hearing would be January 16th
18 for that issue?

19 THE COURT: Correct.

20 MR. GALARDI: And Your Honor, we did file an
21 objection. We thought we had raised this issue,
22 obviously didn't do it as forcefully. So we may
23 want to supplement it. I'm sure the committee may
24 want to supplement that as well. So I would expect
25 that would be the case.

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1 Your Honor, I don't believe there are any
2 other objections to the DIP. And I don't believe
3 there are any objections to our motion to file
4 documents under seal. So we would ask that Your
5 Honor approve those, and then work on a revised
6 order to address both the Navarre issue and the
7 monitor's issue along the lines that I described to
8 the court to make sure the language actually works
9 for those purposes. But we would ask Your Honor to
10 approve the financing and the motion to file the
11 documents under seal.

12 THE COURT: Any party wish to be heard in
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13 connection with either matter?

14 SPEAKER 3: One last point of clarification,
15 Your Honor. Would this -- in connection with this
16 order, would that be -- would there have to be a
17 separate notice and hearing to approve a settlement
18 as it relates to the treatment of -- and payment of
19 a post petition sale.

20 THE COURT: No. We'll just include that in
21 the language of the order.

22 SPEAKER 3: All right. Thank you.

23 THE COURT: All right. It will be approved.

24 MR. GALARDI: Thank you, Your Honor.

25 Your Honor, that -- I believe that, then,
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1 takes us to matter 13 on the agenda for the 10 a.m.
2 hearing, which is the debtors' supplemental motion
3 to pay certain sales, trusts and other taxes.

4 Your Honor, as you may recall, on the first
5 day we got authority to pay various sales use and
6 other taxes. We then determined because the timing
7 was a week later, perhaps, than we first ran that
8 budget there was an additional funding that we had
9 sought approval to pay. The creditors' committee
10 had objected to that motion. As Your Honor may
11 recall, that motion, among other reasons, asserted
12 that we should be authorized to pay sales use and
13 taxes because they were trust fund taxes, or there
14 were other reasons for paying those. The committee
15 objected, and put us to our proof on trust fund

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16 taxes. Again, we had said there were other grounds.

17 After going through a long state-by-state
18 analysis with the committee, we agreed with the
19 committee on six states not being trust fund taxes.
20 And so, therefore, we had the authority with the
21 committee's consent to go pay all the other taxes.

22 There's about six jurisdictions that are not
23 trust fund taxes. And given the need for liquidity
24 that we were facing at this time, we have agreed
25 with the committee to not seek to pay those taxes

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1 during this period of time. Those jurisdictions are
2 Arizona under the Arizona statute 42-508; Arkansas
3 under the statute ACA 2652-501. California we do
4 not believe is a trust fund state. The District of
5 Columbia, which is 47-2002. Hawaii, which is HRS
6 237-13; and Michigan which is MCLA 205-52.

7 Your Honor, I read those into the record
8 because what we have done with the committee is
9 entered into a stipulation that essentially provides
10 for the following: That we are authorized and
11 indeed have paid the taxes with respect to the other
12 jurisdictions; that we and the committee agree that
13 the taxes for those jurisdictions under the statutes
14 that we have listed which we believe are the
15 statutes by which the taxes would be due and payable
16 are not trust fund taxes. We're asking Your Honor
17 to enter the stipulation that says that they are not
18 trust fund taxes.

19 And to give Your Honor an idea of why that's

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20 important: One, if it's a trust fund tax, it's not
21 property of the estate. So we want to make sure
22 we've covered. Also, because a lot of these taxes
23 have fiduciary obligations behind them, we want to
24 be ordered not to pay them, and Your Honor to make a
25 finding that they're not trust fund taxes because if
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1 they were, we have to pay them. So we entered into
2 a stipulation where we're asking Your Honor to make
3 a finding, along with us and the committee, that
4 they're not trust fund taxes. At the same time, the
5 stipulation essentially provides a negative notice
6 to those jurisdictions with a right to challenge
7 that. And so it's an interim finding based upon our
8 review of this statute that these are not required.
9 They're not required to be taken out of the
10 proceeds. There are various reasons in each of
11 these statutes that we've come to the same
12 conclusion as the committee that they're not trust
13 fund taxes. The stipulation is that we will not be
14 paying those, but we give the jurisdictions of the
15 notice provision. And if they want to take the
16 position that they are trust fund taxes and
17 therefore not property of the estate, they come
18 back. So it's not that we're asking Your Honor to
19 make a final ruling on that.

20 With that stipulation, Your Honor, we would
21 resolve the committee's objections. The money would
22 be held in advance subject to further order of the

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23 court if Your Honor says they're trust funds then
24 they can be paid. And then we've reserved our right
25 as the debors. If there were other business

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1 reasons -- for example, if the taxes, penalties,
2 etcetera, are greater than our borrowing under the
3 DIP, we've still reserved our rights that there may
4 be other reasons which were set forth in our first
5 day motion. But at this point to get to the next
6 stage of this case at the beginning of January,
7 we've agreed with the committee not to pay these
8 taxes. And that's what our stipulation provides.

9 That resolves the only objection that we know
10 of to this motion. We'd ask Your Honor to approve
11 it. We can submit a stipulation that we and the
12 committee have been working on to authorize the
13 payment of all other taxes and not pay these taxes
14 subject to Your Honor's authority, and then finding
15 that they're not trust fund taxes, and then putting
16 it out on negative notice.

17 THE COURT: What was the notice period that
18 you'll be giving for the jurisdictions?

19 MR. GALARDI: I think we set it up for
20 January 16th hearing, so it's January 6, Your Honor,
21 that they would have to object by.

22 THE COURT: And that notice would go out
23 when?

24 MR. GALARDI: If Your Honor enters the order
25 today, we would get it out the next day. So it's --

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1 if we get the stipulation approved, we'd give notice
2 of the stipulation and serve it on them on the
3 22nd -- 23rd.

4 THE COURT: All right. Thank you.

5 MR. FEINSTEIN: Your Honor, I just want to
6 make it clear that this isn't simply our agreement.
7 We wanted a stipulated order for the reasons that
8 Mr. Galardi articulated, because it's our opinion our
9 consistent view that trust funds can be paid out
10 because they're not property of the estate. But
11 otherwise, we were opposed to the payment of any pre
12 petition taxes, including priority taxes. And in
13 regard to the other arguments about fiduciary
14 responsibilities, criminal and so forth, it's our
15 view that the automatic stay prohibits efforts to
16 collect these taxes directly or indirectly, and that
17 there is no basis at this point on the record shown
18 to pay these pre petition taxes and the stipulated
19 order would reflect that.

20 THE COURT: All right. Thank you.

21 Mr. Galardi, I would like to extend the notice
22 period.

23 MR. GALARDI: We were just going to say that.

24 THE COURT: Because of the holidays and such
25 to the 13th, give the jurisdictions an extra week.

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1 MR. GALARDI: That's fine, Your Honor. We

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2 were just mentioning with the holiday we think
3 that's the right thing. So we'll change the
4 stipulation to the 13th.

5 THE COURT: All right.

6 MR. GALARDI: Your Honor, again, the only
7 burden will be ultimately -- I assume if they brief,
8 we'll probably want to respond F. that's fine with
9 Your Honor with that schedule, it's perfectly fine
10 with us.

11 THE COURT: That's fine with Maine I realize
12 that.

13 MR. GALARDI: Thank you, Your Honor. We will
14 finalize that stipulation and make that change and
15 submit to it resolve that issue.

16 THE COURT: With that change, it will be
17 approved.

18 MR. GALARDI: Thank you. Your Honor, the
19 next motion on the agenda was the committee's motion
20 for privileged information. So I'll turn the podium
21 over to Mr. fine Steen.

22 THE COURT: All right.

23 MR. FEINSTEIN: Thank you, Your Honor. We
24 filed the -- what has become a customary motion now
25 in light of the amendment to section 1102 B to

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1 provide some limitations to what would otherwise be
2 an open ended statutory obligation on the
3 committee's part to share all information with
4 creditors at large. There is a protocol that dates
5 back to the rev could case that's been followed by

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6 judge Tyson, movie gallery and other courts around
7 in the country. In response to the motion, we
8 received informal comment from the debtor, informal
9 comment from the office of the United States trustee
10 and one written objection.

11 The debtor -- and we have a couple of wording
12 issues that we may deal with after the hearing,
13 nothing that I think I would view as material, but
14 tinkering with one or two sentences -- with respect
15 to the comments received by the office of the United
16 States trustee, through inadvertence that I'll take
17 responsibility for, the provision in the order
18 providing for creditor challenge to withholding of
19 information was omitted. We've included it in a
20 black line copy that I can hand up to the court.
21 And it follows the rev co-protocol. We understand
22 that that resolves the concerns of the office of the
23 United States trustee. That leave it is filed
24 motion of the United States, the IRS. I want to
25 address the several arguments in there briefly.

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1 First, with the observation that the IRS is not a
2 beneficiary of section 1102 B. This was a provision
3 intended to deal with information flow to general
4 unsecured creditors. With that said there, are
5 several points raised by the IRS; one which we
6 dispensed with is the notion of a challenge to the
7 withholding of information with the additional
8 language we've put back in. We don't view that as

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9 being a live issue any more. So that leaves the
10 arguments that remain which are, number one, that
11 the information protocol, according to the IRS,
12 creates some new debtor creditors committee
13 privilege to unilaterally withhold information; and
14 I guess a related argument is if the information is
15 to be withheld, the IRS wants us to maintain a
16 privilege log. Addressing both of these points:
17 First, there is no new or different privilege that
18 is being established here. The rev co'd protocol
19 makes it very clear that in order for a committee to
20 function, it simply can't be required to turn over
21 all information to all creditors on demand;
22 otherwise, a creditors committee would never get any
23 information and committees couldn't perform their
24 statutory functions. So the rev co protocol has
25 developed a methodology for dealing with what is

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1 already a fairly conventional definition of
2 confidential information, and a definition of
3 privileged information that follows attorney-client
4 and attorney work product privilege. There are no
5 new privileges or categories of information being
6 created here, but simply an approach to dealing with
7 these existing categories of information in a
8 sensitive way that allows the Chapter 11 process to
9 function. So we don't view the argument that there
10 is an attempt to create a new debtor committee
11 privilege as having any merit. It's simply
12 factually untrue.

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13 With respect to the management of the
14 information, what the IRS has asked for is if
15 information is to be withheld, that a log of
16 confidential information be maintained. Your Honor,
17 it is -- it would be a tremendous burden on the
18 process for either the debtor or the committee or
19 both to keep a log of every communication between
20 the debtor and the committee, between the committee
21 and its counsel, and otherwise. As it is, it's
22 difficult doing time in six minute increments, but
23 to stop and make a log of every communication ever
24 had would grind the process to a halt. We've got
25 very important and challenging work to do in this
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1 case and in other cases. And the issue of a log
2 has, to my knowledge, never been raised in the three
3 years since Bapsipa was enacted. And we would
4 oppose -- and grafting onto the revco protocol an
5 additional requirement that would really bog down
6 the process.

7 The last argument raised by the IRS is
8 that -- is a criticism of the committee's website.
9 Granted, it's not therefore amusement or
10 entertainment. It's therefore information. And it
11 does have the essential information regarding what's
12 on the court's docket, the major matters of the
13 case, calendar, deadlines for filing a claim. It's
14 not clear what else the IRS would like to see in the
15 website. We're happy to take suggestions. But we

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16 do think that what's on there is consistent with the
17 rev could protocol. We have also counsel's contact
18 information in case creditors have questions, which
19 is also in the revco protocol, so that if
20 information that a creditor wants to letter about a
21 case isn't found on the website, they can always
22 call me or my colleagues and we would answer it. So
23 we would ask that that objection also be over ruled.
24 Thank you.

25 MR. GALARDI: Your Honor, part of the
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1 debtor's perspective -- and we join the committee
2 and we're fine with U.S. trustees -- we have to
3 remember we still are an SEC reporting company. I
4 think that cannot be lost in the information that we
5 give. We've been struggling with the committee on
6 confidentiality agreements. They have agreed to
7 keep everything confidential. And frankly, with the
8 kind of massive material and the timing of all of
9 this, we don't stamp everything confidential. We
10 treat it as confidential. And I'm sure Your Honor
11 from practice understands that if we had to sit
12 there and stamp, review, and say confidential,
13 highly confidential. So we're comfortable working
14 out our issues with the committee. But given that
15 we are a public company -- though our stock is not
16 still listed -- it's still a concern for this board.
17 So we agree with the committee that we can do what
18 we can do here, but it would be an incredible burden
19 to make us stamp everything, give it to the

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20 committee. It would just kill the discussions,
21 which -- as Your Honor is aware of the time frame --
22 have to take place on an expedited time frame, and
23 cannot be slowed down, because it would be a
24 detriment to all of the unsecured creditors. But we
25 will provide as much information as we can to the

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1 committee on that.
2 THE COURT: All right. Thank you.
3 SPEAKER 3: Good afternoon. Richard Stein on
4 behalf of the Internal Revenue Service. I think the
5 major reason -- well, I know the major reason I
6 filed this objection is that as the initial order --
7 proposed order stood, it was absolutely no provision
8 for any type of review or appeal from a decision by
9 the committee and/or the debtor that something was
10 confidential, and that -- or privileged, and,
11 therefore, go away. Don't bother us. Nobody can
12 review it. It was a unilateral act, and that is --
13 was not contemplated by they referred to as the rev
14 could protocol and didn't seem to exist in any of
15 the large cases since rev co-that had been reported.
16 The -- I do have a problem -- I understand the
17 requirements that secrecy -- well I understand the
18 requirements of secrecy and confidentiality both in
19 terms to have SEC and clearly in terms of
20 information that I obtain through my position with
21 the Internal Revenue Service. I think, however,
22 that what we have in this situation -- and maybe

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23 we're arguing semantics -- is a difference between
24 information that goes to the committee and an
25 unsecured creditor makes a request, which I view as
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1 something akin to an informal discovery request.
2 And the obligation of the party refusing to disclose
3 information to identify the information in the type
4 of information that they are refusing to disclose so
5 that there can be some sort of rational basis for
6 analyzing the alleged confidentiality or the alleged
7 privilege. I mean, we're not dealing here with a
8 parent say together a child, no, you can't do that.
9 Why can't row do it? Because I said so. Well,
10 you've got to have some sort of give and take, and
11 some sort of assertion of a privilege. I mean,
12 Judge Payne in the Infineon case went into a very
13 long -- which is cited in my objection -- went
14 through a very long description of what the -- what
15 type of -- when one is asserting either a privilege
16 or refusing to disclose what is asserted to be
17 confidential information, the type of description of
18 the information that is being withheld so that
19 there can be some sort of identification. Now, in
20 the revised -- or the draft of the revised order
21 that I was provided shortly before 9 30 this
22 morning, there is language in that order that says
23 that the committee, on page 5 of the order it says
24 nothing here in shall be deemed to preclude the
25 requesting creditor from requesting or the committee

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1 objecting to such requests that the committee
2 provide the requesting creditor along -- I believe
3 that's a typo and it should be a log -- or other
4 index of information specifically responsive to the
5 requesting creditor's request that the committee
6 deems to be confidential or privileged. so they're
7 saying, well, we could or we couldn't. But that's
8 not they need to. In discussions with the
9 committee's counsel or cocounsel, there was some
10 question of the revised order deals with the
11 creditor asking and then the creditor and the
12 committee and the debtor get together and have a
13 discussion. And then at some point if we can't get
14 something resolved, we come to the court and we say,
15 Your Honor, we want the information, but we don't
16 know what information they have. The creditor is
17 going to come to you and say we don't know what
18 information they have that they're not giving us
19 because they haven't given us a description of what
20 it is. So all I think that is required is that when
21 the denial -- when there is a denial of the
22 disclosure of information, that the type of
23 information -- if it's a document, that there be a
24 description of the document provided the authority
25 or the privilege or the assertion of

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1 confidentiality, why it is, just like we were in any

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2 formal type of discovery situation. I think that
3 that's -- that's imperative.

4 Now, with respect to my last objection, I'm
5 not the only person who ever has raised in the large
6 context of these type the fact that what the
7 committee -- when you read the motion and the
8 proposed order absent any kind of court review which
9 now has been resolved, and absent some sort of
10 maintenance and provision for a description of the
11 information -- a general description of the
12 information that is being withheld so that, you
13 know, if they tell me it's entirely possible that
14 the -- if you assert the attorney-client privilege
15 and you have some description of -- a general
16 description, no problem. But if you just say it's
17 privileged or it's confidential, there's no way of
18 anybody analyzing it. But I'm not the only one who
19 has ever stated that what they're proposing on their
20 website is simply that which is available on the
21 court's CMECF filing. That's all I was saying
22 is that the way the motion and the proposed order
23 was initially proposed, it's: It's we're not going
24 to give you anything. And the website is giving no
25 more information than what's already available.

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1 THE COURT: What do you want on the website.

2 ATTORNEY1: I don't want anything on the
3 website. What I really want is perhaps the
4 objection was inartfully drafted. Perhaps I
5 shouldn't have had a number 7, and simply included

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6 that in my -- in paragraphs five or paragraph six
7 where I'm talk act the maintenance of privilege and
8 the opportunity for judicial review. It's just that
9 the committee says what we -- you know, everything
10 that is given to us is confidential because when you
11 read the the definition of what constitutes
12 confidential information, it's anything that's
13 non-public. Well, the only thing that is are
14 non-public are obviously sale prices, stuff readily
15 available through the media, or as what was pointed
16 out to me by co-counsel for the creditors committee
17 is stuff that's on the court website. Well, now
18 they're giving no more than that. That's all I was
19 saying.

20 THE COURT: All right. I understand.

21 SPEAKER 3: But I think that there is clearly
22 a need for some sort of description for either
23 privilege --

24 THE COURT: Now there is a provision, though,
25 for creditor challenge, as I understand, in the

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1 black line version. And can't we take care of the
2 description issue if there is a challenge on a
3 case-by-case basis?

4 ATTORNEY1: Well, I think we can. I think --

5 THE COURT: Wouldn't that be more appropriate
6 than putting it into this order?

7 ATTORNEY1: Well, it's in this order in that
8 -- it's sort of in the order; and then once again,

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9 sort of not in the order at the discretion of the
10 committee or the debtor in that nothing in here
11 shall preclude the requesting creditor from asking
12 the committee to provide. It doesn't say that the
13 committee has got to provide it.

14 THE COURT: No. But if they don't, can't the
15 creditor come to me, then, and say we want you to
16 provide it in this case because we have a specific
17 need for it.

18 ATTORNEY1: But how do I know? What I'm
19 saying is, yes, any creditor could certainly come to
20 Your Honor and say, the committee has said we can't
21 provide you information because it's confidential.
22 And you say to me, Mr. Stein, what information is it
23 that you are asking for that they have refused to
24 disclose to you? Give me a description of it. Your
25 Honor, I have no idea what information it is, or a

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1 description of the document because they haven't
2 given that to me. that's all I'm saying. If there's
3 going to be judicial review of a decision, then
4 there needs to be some sort of description of the
5 item that is not being disclosed so that Your Honor,
6 as well as the party, can analyze whether or not
7 there may, indeed, be a very valid assertion there,
8 and then there is no need. But if you don't have
9 that description, then initially the creditor can't
10 make the analysis, and certainly the creditor has no
11 ability to articulate to the court what document it
12 is that they're asking for because it hasn't, even

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13 in the most general terms, been described.

14 THE COURT: Okay. thank you.

15 MR. FOLEY: Thank you, Your Honor.

16 MR. FEINSTEIN: A couple of points, Your
17 Honor. The rev co-protocol language which we have
18 now included does say that the requesting creditor
19 can ask for a lot. Your Honor's suggestion of a
20 case by case approach which is in the rev could
21 protocol really makes the best sense because if you
22 think about it if a creditor asked me for a log with
23 respect to Navarre, I would have three emails and I
24 attachment. If a creditor asked for everything
25 regarding the DIP financing, I'd have to shut down
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1 all of our work for the next week and try to create
2 a log, which is, you know, the sender, the
3 recipient, the the subject matter, and so forth. It
4 would be unworkable. So this approach allows for
5 the committee in the first instance to decide
6 whether or not that's feasible. If the committee
7 says no, the creditor has the right to come to you,
8 to put the shoe on the other foot would really
9 create an undue burden on the committee, that to ask
10 for Your Honor for relief from an obligation and a
11 court order to create a log.

12 The other thing I would note is the citation
13 to the Infineon case. It's a pre Bapsipa case; but
14 more importantly, it's an actual litigation case --
15 two parties to a litigation fighting over Rule 26.

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16 We're in a much different environment where, you
17 know, under 1102 we're supposed to provide
18 information. And we simply don't think that the
19 Rule 26 structure and privilege log applies.

20 THE COURT: All right. Thank you. The court
21 also doesn't think that the Rule 26 structure
22 applies, just the give and take with the committee
23 has to do in connection with a Chapter 11 case
24 doesn't lend itself to that kind of a procedure.
25 And the committee necessarily has to have access to
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1 information that is going to be confidential and
2 kept that way. I'm very familiar with the protocol,
3 and the court will approve it as amended.

4 MR. FEINSTEIN: We'll submit a memo.

5 THE COURT: And the objection of the Internal
6 Revenue Service is overruled.

7 MR. GALARDI: Thank you, Your Honor. Moving
8 to matter number 15 on the agenda, it's the motion
9 for relief and the automatic stay by U.S. Signs.
10 I'll turn the podium to them. Mr. Frederick will be
11 handling that.

12 THE COURT: All right. Thank you.

13 SPEAKER 3: Good morning, Your Honor.

14 Richard Hudson on behalf of US Signs.

15 Your Honor, this is a motion for relief from
16 the automatic stay. Just a little background, Your
17 Honor: US signs is a company out of Texas. It did
18 some work with the debtor, Circuit City, and has a
19 store in New Jersey. A little background on the

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20 issue: They supply labor and materials to the
21 debtor. As you know, 362 prevents the filing or
22 creation of a lien on the property of the debtor
23 once the filing occurs. Now, there is an exception
24 to this which if the -- based on the the lien
25 statute of the estate, if the filing occurs relates
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1 back to the first supplied material, is not deemed
2 to violate the stay. Based on our reading of the
3 New Jersey statute, it does not relate back; and
4 therefore, we want to be cautious and go ahead and
5 file and ask for relief. Now, in the first
6 instance, it's important for us to understand that
7 Circuit City is not the owner of this property. Our
8 they to have a leasehold interest. However, for all
9 intents and purposes we're not sure whether or not
10 by the very filing of the bankruptcy it terminated
11 that lease; and therefore, it has a -- they
12 terminated their interest in that property. Also,
13 the second thing is the nature --

14 THE COURT: Well, filing this bankruptcy
15 doesn't terminate a lease, if it's a lease the
16 debtor would have a right to either assume or reject
17 the lease.

18 SPEAKER 3: That's my second point, Your
19 Honor. From my understanding, the debtor very well
20 may be rejecting this lease. As far as we know. I
21 have not seen this on the list of -- based on the
22 the debtor's filings to assume this particular

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23 property. For all we know, this lease will
24 terminate by itself by the end of December.
25 However, in either case, it would be based on the
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1 terms of the lease. And I'm not sure what the terms
2 of the the lease are. I don't believe the lease was
3 ever recorded. Our primary interest in filing this
4 lien is not simply against the leasehold interest.
5 We plan on arguing that the landlord may have
6 benefited from the labor and materials supplied to
7 this property, as well. So our claim is not solely
8 against the leasehold, but the freehold estate as
9 well. And that's an argument we plan on making in
10 the appropriate circuit court in New Jersey. The
11 right of U.S. signs to assert this is clear on that
12 point.

13 Now, Your Honor, also the -- it's also
14 important to understand that the the importance of
15 this filing -- of preserving our rights under New
16 Jersey law, we have 90 days to file I believe the
17 the last filing -- the last supply of material was
18 October 3rd. We have until the beginning of the
19 year to file our -- to file our lien, as well as to
20 file a complaint to establish the validity of the
21 lien. As I've stated in my motion, we are not
22 attempting to foreclose on this property or to sell
23 the property in any way. We're seeking to preserve
24 our rights and preserve our rights only. And it's
25 under New Jersey law in which we can establish not

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1 just the validity and priority of the lien, but the
2 amount of the lien as well. It's U.S. sign's
3 priority to -- at least our prerogative to do so.
4 And the debtor has a right to challenge that. So
5 does the landlord, in which case we can argue --
6 make our case the landlord may have benefited from
7 the materials as well.

8 THE COURT: Do you intend to put on evidence?

9 SPEAKER 3: Your Honor, we do intend on
10 putting on evidence.

11 THE COURT: Today?

12 SPEAKER 3: Not today. Not today. Our
13 interest in this proceeding here is to seek -- show
14 that cause exists to lift stay so that we can pursue
15 our rights under New Jersey law in the appropriate
16 court in New Jersey. It's a two-step process. We
17 file the lien. We then file our complaint to
18 enforce that lien and to establish the validity of
19 the lien in state court.

20 THE COURT: You want to assert a mechanic's
21 lien?

22 SPEAKER 3: Exactly. And that's where the
23 debtor will be put on. Now, the debtor, as well as
24 the landlord, will be free to challenge that. They
25 can challenge whether or not we have a valid lien

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1 once the lien is filed. They can then challenge

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2 whether or not the amount of that lien is
3 appropriate. They can also challenge whether or not
4 the -- challenge the priority of the lien, as well.

5 THE COURT: Well, don't you have to
6 establish, in order to get relief from the stay, one
7 of the elements under 362-D to either cause, or one
8 of the other elements to show that you have the
9 title to relief?

10 SPEAKER 3: Yes, Your Honor. And we do
11 believe cause exists.

12 THE COURT: What is the cause?

13 SPEAKER 3: Well, we -- right now, as far as
14 we know, this may not be the property of the
15 debtor's estate, as well as the fact that we're not
16 seeking a lien solely on the property of the
17 debtor's estate. It's also on the freehold estate
18 as well.

19 THE COURT: But I'd have to have evidence of
20 that, wouldn't I, in order to rule on that?

21 SPEAKER 3: Well, we believe that merely
22 making that statement entitles us to at least
23 establish that in the state court proceeding. And
24 in doing so, be able to -- the debtor can certainly
25 make that argument in the state court proceeding

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1 that we're not entitled to a lien, but we to believe
2 that at that point that's the proper proceedings to
3 handle that matter.

4 THE COURT: All right. Thank you. Let me
5 hear from the debtor.

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6 SPEAKER 3: Good morning, Your Honor. I am
7 Fredericks of Skadden Arps on behalf of the debtors.

8 I think -- I think first I'd just like to
9 point out I believe under the bankruptcy code this
10 would just be a preliminary hearing. And the court
11 is free to schedule a final hearing, which the
12 debtors would not have an objection to, on the 16th.

13 I think the second point is factually
14 everything you just heard is not one supported by an
15 affidavit and there's no evidence before you. We
16 don't believe that U.S. signs has established cause
17 to lift the stay. All the information I have is
18 that this lease has not been rejected yet; and so,
19 it still is property to have estate; thus, by them
20 filing a mechanic's lien against the property would
21 directly impact the estate. Frankly, we just don't
22 feel that cause has been established, and thus the
23 motion should be denied. If the movement would like
24 to move it over to January 16th, we're certainly
25 open to doing that.

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1 THE COURT: Thank you. Do you wish to move
2 it to January 16 so you can have an opportunity to
3 put on evidence.

4 SPEAKER 3: Your Honor, we would love to do
5 that but the issue is by January 16th our lien
6 rights to file this lien would expire.

7 THE COURT: I can't grant your motion today
8 because I don't have any evidence. So you have an

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9 opportunity -- you can -- either I can deny it
10 today, or I can move it to a final hearing on the
11 16th.

12 SPEAKER 3: We'd love to present evidence at
13 that time; however, as I said, our lien rights and
14 my client will be irreparably harmed by doing so.
15 We do believe that -- we've established that even
16 though it's a leasehold estate, the owner possibly
17 could have benefited from this, as well. And had we
18 known that we were required to file an affidavit to
19 that effect, we very well may have con so. However,
20 we didn't believe this was the proper forum to do
21 so.

22 THE COURT: All right. So are you asking
23 me to continue it to the 16th or not?

24 SPEAKER 3: Yes, Your Honor.

25 THE COURT: In g oh. We'll carry -- have a
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1 final hearing on the 16th.

2 Do you wish to be heard?

3 SPEAKER 3: Your Honor, actually, the
4 landlord, the missing piece, I'm here on behalf of
5 north playing field, BF, LLC. And on Friday, we
6 filed a motion to compel those post petition
7 obligations and set that for 1-16 at 10. So I
8 believe the momentum of what's happening here to
9 have this continued to a final hearing on 1-16 at 10
10 would address what we filed Friday, December 19th
11 with regard to this same property and US sign's
12 motion, and other mechanic's liens, candidly,

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13 against those properties could all be addressed
14 properly then.

15 THE COURT: I'm going to set it down for the
16 16th. If for some reason this becomes moot between
17 now and then, you can always withdraw it.

18 MR. FOLEY: Your Honor, the last item on the
19 morning agenda is item number 17, which is our
20 motion to reject certain executor contracts.

21 THE COURT: We've already resolved number 16
22 earlier when we heard the.

23 MR. FOLEY: The Navarre matter.

24 THE COURT: The DIP financing.

25 MR. FOLEY: That's correct, Your Honor. This
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1 is our motion to reject certain executory contracts
2 with executive employees -- former executive
3 employees, Your Honor. There's been a couple of
4 objections filed.

5 There is one individual who would be
6 represented by Mr. Shai a, who called earlier this
7 week -- last week asking for additional time to file
8 a response. We've agreed as to Patrick Longgood,
9 who was one of the counter parties to a contract in
10 the motion to provide Mr. Shai a until December 29th
11 to file a responsive pleading if he so chooses, and
12 that this motion as to that individual will go
13 forward on January 16.

14 Your Honor, I guess we're requesting relief
15 -- it's pretty straightforward -- in the motion. I

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16 guess it's probably better to let the objectors
17 raise their arguments first. I don't think there's
18 any dispute as to the fact that the two agreements
19 in question are pre petition. To the extent they
20 are executory -- and we don't think they are -- we
21 think it's proper to reject them and effectuate the
22 prepetition claim status from any breach resulting
23 from rejection under 365 G and 502 G 1.

24 But if Your Honor concludes that these are
25 not executory contracts and can't be rejected,

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1 they're still pre petition contracts. And a breach,
2 to the extent it gives rise to any claim at all,
3 it's a pre petition claim, which is really what
4 we're trying to seek to establish here, Your Honor.

5 THE COURT: All right. Very good.

6 SPEAKER 3: Good morning, Your Honor.

7 THE COURT: Good morning.

8 SPEAKER 3: Actually, good afternoon. I
9 apologize. Mike Miller with the law firm of
10 Christian Barton on behalf of two objecting counter
11 parties to the contracts. One is Mr. Jeffrey
12 Leopold, who is in the courtroom with me. And the
13 other gentleman is Mr. James Wimmer, who is also in
14 the courtroom with me today, Your Honor. Thank you
15 for your time.

16 Before I forget, Mr. Foley indicated that to
17 the extent that the court determines that the
18 contracts are not executory, they're still, under
19 their view, pre petition contracts such that they

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20 would be pre petition claims. And that is not in
21 their motion, Your Honor. To the extent that the
22 court determines they are not executory today
23 subject to rejection, I would like to have the
24 opportunity at a later date to address those issues
25 with respect to whether or not they're post petition

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1 obligations such as administrative claims because
2 there are payments that come due under those post
3 petition.

4 Your Honor, we submit that the contracts are
5 not executory. As you know, a contract is executory
6 is performance is due to some extent on both sides.
7 This circuit in the Luberzal case adopted the
8 country man test, which states that a contract is
9 executory if the obligations of both the debtor and
10 the non debtor party are so far unperformed that the
11 failure of either party to complete the performance
12 would constitute a material breach excusing the
13 performancy of the other. Here we believe that
14 Mr. Leopold and Mr. Wimmer's contracts are not
15 executory. Mr. Leopold's contract is actually a
16 severance agreement. He was terminated effective
17 July 18th by agreement with Circuit City and it was
18 a severance agreement. And that contract is
19 attached as an exhibit to my objection on be after
20 of Mr. Leopold. And there is not one single
21 obligation that Mr. Leopold has to perform. The
22 only remaining obligations under that contract are

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23 the debtor's obligations to continue to make
24 severance payments. He's entitled to an additional
25 six months, roughly 55 thousand dollars in severance
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1 payments. But there is no obligation of Mr. Leopold
2 such that non performance would constitute a breach.
3 There isn't even non compete obligations under that
4 agreement. Mr. Leopold's only obligation was to
5 give the debtors a release of any and all claims,
6 which he has done. So there are no obligations on
7 behalf of Mr. Leopold. And it's very, I believe,
8 cut and dry under the country man test that it's not
9 executory, and then there for not subject to
10 rejection. To the extent that there are additional
11 payment that is come due post petition, we can argue
12 for another day if Your Honor pleases as to whether
13 or not they're pre petition or post petition subject
14 to an administrative expense claim.

15 Your Honor, we also submit that Mr. Wimmer's
16 employment agreement.

17 THE COURT: If it's not a contract, then he
18 would be a creditor, right?

19 SPEAKER 3: He would be a creditor, correct,
20 Your Honor. The question is when the payments
21 become due, and whether they're post petition
22 obligations or pre petition obligations. But
23 you're right. It's not -- it wouldn't be an
24 executory contract, he would be a creditor.

25 THE COURT: And just help me. What is the
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1 argument that says that it would possibly be a
2 post-petition obligation if it was an agreement that
3 was entered into pre petition?

4 SPEAKER 3: There are cases that suggest that
5 post petition payments, even though they are part of
6 a pre petition contractor obligation, if the
7 payments come due post petition, those payments can
8 be an administrative expense claim.

9 THE COURT: That's what you would like the
10 opportunity to agree.

11 SPEAKER 3: Your Honor, I would. And Your
12 Honor, on the expedited nature to have relief
13 requested, this was filed on a Friday night.
14 Objections were due the following Thursday. I
15 didn't get it until Tuesday, frankly. I know there
16 are a number of employee -- former employees in the
17 courtroom that actually didn't get served with the
18 rejection motion until after the deadline to
19 respond. It just so happens that Mr. Wimmer and
20 Mr. Leopold contacted me prior. I'm -- my office
21 monitors all the pleadings that are filed in the
22 case. And we saw it and filed an objection as
23 quickly as we could within the time frame as
24 required.

25 Your Honor, we also submit that Mr. Wimmer's
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1 agreement which is an employment agreement and they

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2 also seek to reject, is termination letter that was
3 dated November 7th, three days before the bankruptcy
4 filing. Mr. Wimmer, after service in the Air Force,
5 started employment with wards in many 1968 at the
6 age of 22. He is the longest tenured employee. He
7 has been with the company for almost 40 years. It
8 will be 40 years in May of 1999. As a result of
9 his -- or pardon me, May of 209. As a result of his
10 long, tenured service to the company, and his faith
11 full performance under the agreements, he has earned
12 significant benefits under his employment contract.
13 And we're not talking about an insignificant sum
14 here. Specifically, his employment contract
15 provides that he is entitled to approximately
16 \$433,000 as a severance payment -- not an
17 insignificant amount of money to Mr. Wimmer and his
18 family. Mr. Wimmer's only remaining obligation
19 under his employment agreement, frankly, is to work
20 another 15 days. He is terminated effective January
21 9th. The letter that came out to him on November
22 7th, three days before they filed, asked him to
23 remain with the debtor until January 9th. So he's
24 got roughly 18 days left to perform, if you will,
25 under the employment agreement. In addition, under

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1 the employment agreement which was dated his most
2 recent one -- he's had several other the last 40
3 years, was dated December fourth, 2003. And under
4 that employment agreement they actually -- the
5 debtors only need to give him 30 days notice to

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6 terminate without cause and all of his severance
7 obligations which are a contingent obligation,
8 mature. So the fact of the matter is if you looked
9 at the 30 days that was only required under the
10 contract, his rejection motion came after the
11 anniversary date of his employment contract.

12 We submit that the roughly 18 day that is the
13 debtor have asked him to serve until January 9th, in
14 fact, in part of his service is to assist with the
15 store closings, is not material, and is not
16 executory under the country man test. That
17 remaining 18 days after 40 years of service is not
18 material. On the other hand, the debtor's severance
19 obligations of 433 thousand dollars roughly are very
20 material to Mr. Wimmer and to his family.

21 Your Honor N the event that you determine
22 that Mr. Wimmer or Mr. Leopold's agreements are, in
23 fact, executory -- still, and again, I just don't
24 see how Mr. Leopold's agreement could ever be
25 determined to be executory -- but if Mr. Wimmer's

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1 employment agreement and the 18 days remaining under
2 the employment agreement are material such that this
3 court determines that they are he can he can you
4 tire, we would submit the the court should
5 nevertheless deny the debtor's motion to reject the
6 contract because any perceived benefits to the
7 estate, which are minimal, are greatly outweighed
8 by the detrimental effect to Mr. Wimmer and his

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9 family. The same goes for Mr. Leopold, in our
10 opinion because of the detrimental effect of 55
11 thousand dollars to Mr. Leopold and the minimal
12 benefit that would provide to the estate and the
13 general unsecured creditors.

14 THE COURT: You're suggesting that I should
15 require the debtor to assume the contract?

16 SPEAKER 3: In the event that Mr.-- in the
17 event that you determine that they are executory, I
18 submit that you should deny their motion to reject,
19 because of the effect it will have. And I know that
20 great deference is given to the debtor's business
21 judgment under the business judgment rule and
22 Lubrizol and other cases of that ilk; however, it is
23 not without its limitations. In track auto, judge
24 Adams said that you have to look at the totality of
25 the circumstances to all constituencies, not just to

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1 the creditors' estate, and not just to the unsecured
2 creditors; but also to the non debtor contracting
3 party and the other constituencies. In track auto,
4 judge adams stated that the better reason view is to
5 evaluate a debtor's business judgment by considering
6 the input -- pardon me, the impact of the debtor's
7 decision on a variety of parties, as well as the
8 impact on the debtors' estate; i.e., a judicial
9 review of the totality of the circumstances
10 surrounding the debtor's proposal. Your Honor, the
11 debtor's petition that they filed on November 10th
12 indicated that their liabilities are 2.3 billion

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13 dollars. The payment to Mr. Wimmer is 433 thousand
14 dollars. That is less than 2 one hundredths of a
15 percent of their total liabilities. Mr. Wimmer has
16 worked for this company for 40 years to earn these
17 benefits and he will not be able, I am sorry to say,
18 at the age of 62, ever make up this money. This is
19 not a situation in the market -- in the economic
20 times we are in where we are all losing money in our
21 401(k)s and so forth because we investd in the
22 market, and as a result some younger people such as
23 myself hopefully will see that turn around in my
24 lifetime. These are contractual benefits that
25 Mr. Wimmer earned through his dedicated service to
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1 the company over 40 years. And at the age of 62, he
2 will not make this up. And he and his wife and
3 family have depended upon and relied upon his
4 severance benefits under his employment agreements
5 in their long-term financial planning for their
6 family. It's ironic because had he left the
7 employment of the company a year or two ago and
8 start receiving these benefits he would have been
9 paid out these benefits in the course -- the normal
10 course of the contract. But as someone who is
11 dedicated and stayed on, they asked him to stay on,
12 they tried to give him retention bonuses for staying
13 on, they've asked him to stay onto help with closed
14 stores. The ultimate irony is he is going to be
15 penalized for doing so. And if you look at the

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16 totality of the circumstances as the track auto case
17 suggests, the detrimental effect to Mr. Wimmer and
18 his family -- and to Mr. Leopold -- is -- greatly
19 outweighs the minimal impact it will have to the
20 debtor's estate again, we're talking about 2.3
21 billion in liabilities. 433,000 -- I know that
22 argument cuts against me in that I'm arguing it's
23 not an insignificant amount -- but to the debtor's
24 estate by comparison, it is insignificant as
25 compared to the effect it will have on Mr. Wimmer
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1 and his family.
2 Finally, Your Honor, the Lubrazal case also
3 says that the debtor's business judgment should not
4 be granted where it is taken in bad faith or is an
5 abuse of that discretion. And Your Honor, I
6 appreciate counsel's efforts to rehabilitate this
7 debtor and reorganize this debtor. But when we
8 were here on December fifth, there was an
9 impassioned plea made by counsel to the debtors to
10 allow severance payments to be made to the roughly
11 580 employees, I believe it was, that were laid off
12 on November 7th -- the same day Mr. Wimmer received
13 his termination notice -- on the grounds that it was
14 important for employee morale to keep the people in
15 corporate headquarters, their heads in the game, and
16 the importance of the news in the community in terms
17 of treating their employees well. I can quote from
18 the arguments that were made by counsel to the
19 debtors at that hearing. And I won't -- I won't

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20 repeat all of them, Your Honor. But they proffered
21 that Mr. Markem would testify that many of the
22 people had given significant time and effort, and in
23 some instances had worked their lives at Circuit
24 City.

25 Well, in nobody's case is that more true than
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1 Mr. Wimmer. He has worked his entire professional
2 life since getting out of the Air Force at the age
3 of 22 for Circuit City. And if you're going to do
4 that to the employee who is the most loyal employee
5 in the history of the company -- again, he is the
6 longest tenured employee -- to me, that suggests
7 that would not be good for employee morale. And on
8 December 5th they were here saying we need to do
9 this for employee morale, and today they're seeking
10 to reject the employment agreement of their most
11 loyal, tenured employee. I'd submit that's in bad
12 faith, Your Honor. Thank you.

13 THE COURT: All right. Thank you.

14 MR. FOLEY: Your Honor, you did hit on the
15 relevant facts that are important here, that these
16 are pre petition contracts; that as of the petition
17 date, they were executory. With respect to
18 Mr. Wimmer, I don't think that's even disputed that
19 it was executory as of the petition date.

20 With respect to Mr. Leopold, there are
21 certain nondisclosure agreements in his contract
22 that the court may or may not find to be material.

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23 And we certainly have no intention of enforcing them
24 post petition. As of the petition date, there are
25 sufficient obligations running both ways with

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1 Mr. Leopold's contracts to render that executory.
2 We think it's subject to rejection of 365, and under
3 the business judgment rule ought to be rejected.
4 We're talking about a \$126,000 payment with respect
5 to that contract. Also, in that contract was July
6 18th, 2008.

7 With respect to Mr. Wimmer's situation, just
8 a correct factual assertion by counsel, Mr. Wimmer
9 was unfortunately one of the people that was laid
10 off on November 7th before the filing. And that
11 November 7th letter was the letter laying him off.
12 And he is a recipient of the warnack payments that
13 Your Honor has approved. He is not working for the
14 company right now. He hasn't worked for the company
15 since November 7th. He is not working on any store
16 closing arrangements, but he is receiving payments.
17 So we did all we could for this individual, as we
18 did with the other employees that counsel
19 referenced. That's what we're talking about. These
20 aren't -- these weren't special severance payments
21 made. He's talking about the warnack money that
22 Your Honor approved actually over the committee's
23 objection.

24 So we did what we could for these employees,
25 Your Honor. And we believe both of these contracts

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1 are subject to rejection with 365, and the court
2 ought to approve the motion with respect to them.

3 THE COURT: All right. Thank you. The court
4 is going to find that the contracts are executory.
5 Mr. Miller, I am going to give you the opportunity,
6 though, to brief the issue regarding whether they're
7 post petition obligations with the debtor or pre
8 petition. So I will withhold that portion of the
9 ruling until I've gotten your papers and any reply
10 with either the debtor or the committee wish to make
11 to them.

12 SPEAKER 3: Your Honor, a point of
13 clarification: I understand that you're saying that
14 the contracts are executory. Is Your Honor ruling
15 today on whether or not you're going to approve the
16 the debtor's motion to reject the contract?

17 THE COURT: Yes, I'm going to approve the
18 motion to reject the contracts. Under the business
19 judgment rule, I think that's up to the debtor to
20 do. I don't think this court can force the debtor
21 to accept contracts. I think the debtor can come in
22 and request that. I think there's a legitimate
23 business reason to do the rejection.

24 But the consequences of the rejection is what
25 I'm going to give you the opportunity to brief,

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1 because you said you had some law that you wanted me

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2 to look at about whether or not these might be post
3 petition obligations of the debtor.

4 SPEAKER 3: Thank you, Your Honor. I
5 appreciate it.

6 THE COURT: Does that take care of everything
7 that's on the morning agenda.

8 MR. FOLEY: Yes, Your Honor. I know it's
9 almost 1 o'clock. I don't know how long you'd like
10 to take a break for.

11 THE COURT: Let's --

12 SPEAKER 3: Your Honor, can I speak to this
13 issue? Before you move on.

14 THE COURT: On the rejection?

15 SPEAKER 3: Yes.

16 THE COURT: Yes. Who are you.

17 SPEAKER 3: Thank you, Your Honor. My name
18 is victor enguesser. I was an employee of Circuit
19 City for 17 years. I did not receive notice of this
20 motion of this hearing until Saturday, December the
21 20th and therefore did not have chance too object.
22 I would like to request that I have that opportunity
23 to file an objection.

24 THE COURT: That will be granted. That what
25 I'll do is I'll carry your objection orally today

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1 over to the next omnibus date, which will be the
2 17th of January. And I think we started at 10
3 o'clock that day.

4 MR. FOLEY: We do, Your Honor.

5 THE COURT: What I would suggest, you need to
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6 file a written objection. And then they can
7 respond. You can also talk to them and see if you
8 can work it out.

9 MR. FOLEY: Your Honor, could we have that
10 objection filed at the same time as Mr. Long good's,
11 which will be December 29th, the same as Mr. Shai'a's
12 client.

13 THE COURT: Are you able to get it filed by
14 the 29th.

15 SPEAKER 3: Yes, Your Honor.

16 THE COURT: Okay. That will be fine. Yes,
17 ma'am?

18 SPEAKER 3: Hello, my name is Lee an Moore,
19 also formerly employed with Circuit City, and I also
20 didn't get the notification until Saturday. So I
21 request that I be allowed to make that objection and
22 file --

23 THE COURT: Your name again.

24 SPEAKER 3: Lee an Moore.

25 THE COURT: Okay. Ms. Moore, the court will
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1 receive your oral objection and I will do the same
2 thing, file a formal objection by the 29th of
3 December and we'll carry this over -- your objection
4 over to the 16th.

5 SPEAKER 3: Okay. Great, thank you.

6 MR. FOLEY: And for the record, judge, we
7 will do that for anybody else that we hear from
8 before we submit the order, Your Honor.

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9 THE COURT: All right. Thank you. are there
10 any other employees in the courtroom? Sir? If you
11 would just state your name on the record.

12 A. My name is David catch Yea aty. I was laid
13 off on November the 7th, and we were not aware of what's
14 going on here. I was told by an H R employee on Friday
15 that this was occurring, and that we were not being paid
16 our vacation pay, P T O, and that we have the right to
17 come down here to file a complaint.

18 THE COURT: All right. So what you need to
19 do is file your objection by the 29th of December,
20 and I'll consider carry this over -- your objection
21 over to the 16th of January.

22 SPEAKER 3: Thank you, sir.

23 THE COURT: All right. I think Mr. Foley
24 what I'd like to do is to recess until 1 30.

25 MR. FOLEY: Okay.

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1 THE COURT: And then we'll resume.

2 MR. FOLEY: Thank you, Your Honor.
3 irreparable.

4 (Recess)

5
6 MR. GALARDI: Good afternoon, Your Honor.
7 For the record, Gregg Galardi on behalf of Circuit
8 City debtors.

9 Your Honor, we had provided Your Honor a
10 separate agenda for the matters at 1 o'clock. I'm
11 going to go through the matters on the amended
12 notice of agenda for the 1 o'clock matters.

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13 My understanding is that the first matter on
14 the agenda is a demand by Green 521 Fifth Avenue,
15 and that that has been resolved. If we can resolve
16 it, we'll either submit an order or it's been
17 withdrawn after the hearing, Your Honor.

18 THE COURT: Very good.

19 MR. GALARDI: The next matter on the agenda
20 is the motion of Raymond and main retail. My
21 understanding is that is also resolved. We've
22 worked on an order. And our intention, again, would
23 be to submit the order after the hearing.

24 SPEAKER 3: Good afternoon, Judge. Neil
25 McCullough for Raymond and Main Retail, LLC. That's
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1 correct. I'm just waiting to see the final version
2 of the order, and we respect to tender it.

3 THE COURT: Thank you very much.

4 MR. GALARDI: Your Honor, similarly, the
5 matter number 3 on the agenda is triangle equities
6 junction, LLC. We have resolved that, and we would
7 again submit an order or a stipulation if necessary.

8 THE COURT: Very good.

9 MR. GALARDI: Your Honor, the next matter on
10 the agenda is an uncontested matter which is the
11 debtor's motion. It's number 4 on the agenda to
12 reject certain -- to approve assumption and
13 assignments of various unexpired non residential
14 real property leases and the sale of equipment. We
15 have no objections to that. It was -- the objection

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16 deadline with December 18th. And we would ask Your
17 Honor first to grant the motion to shorten -- as I
18 believe we put it on shortened notice -- and then to
19 grant the motion to assume and assign those property
20 leases that are subject to it.

21 THE COURT: Okay. The court will grant the
22 expedited motion, and also grant the relief.

23 MR. GALARDI: Your Honor, moving to number 5
24 on the agenda, it is the same motion to assume
25 assign and sell certain property with respect to the
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1 Illinois partnership. Again, I think these are some
2 of the subleases -- oh, we've withdrawn this motion
3 because the party that we actually were going to do
4 it no longer wanted the assumption of assignment.
5 So number 5 we would withdraw, Your Honor.

6 THE COURT: All right. It will be withdrawn.

7 MR. GALARDI: Number 6 is a motion that is
8 uncontested. We have a motion to shorten the time.
9 It is a motion to assume and assign various non
10 residential real property leases. We haven't --
11 received no objections. It was to the Delaware
12 trust or its nominees. I think we've resolved the
13 objection, and ask that Your Honor approve it.

14 SPEAKER 3: Your Honor, Miller on behalf of
15 bond C C. I just want to confirm.

16 THE COURT: All right. Very good.

17 MR. GALARDI: Your Honor, that now brings us
18 to matter 7 on the agenda, which are contested
19 matters. Your Honor, this matter has been carried

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20 since the first day. It is our motion to reject a
21 number of properties which we attempted to reject
22 effective as of November 10. We have a number of
23 objections that are out standing, some have been
24 resolved, some have not been resolved. I think best
25 way to go through it is top to bottom on the the

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1 objections to see if they're resolved or not and to
2 the objections and then we can respond accordingly,
3 if that works for Your Honor.

4 THE COURT: That is my preference.

5 MR. GALARDI: Your Honor, the first objection
6 is the objection of Landover crossing LLC. My
7 understanding is -- as reflected in the amended
8 agenda -- that that matter -- that objection has now
9 been resolved.

10 SPEAKER 3: Good afternoon. Jen McLemore
11 from Christian and Barton here on behalf of Landover
12 crossing. This has been resolved.

13 THE COURT: Very good.

14 MR. GALARDI: Your Honor, the next matter is
15 the objection of cardinal capital partners. My
16 understanding is that's an objection that is, in
17 fact, going forward.

18 I'm not sure how -- many of the objections
19 overlap, Your Honor. I don't know how we want to
20 do -- how do we want to go. We can just do it one
21 by one.

22 Your Honor, this also relates to the matter

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23 where we had a motion to assume and assign a
24 contract and assume the lease. We ended up
25 withdrawing it back on November 4. I guess I'll let
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1 cardinal raise their objection, and I can respond
2 accordingly.

3 THE COURT: I think that would be
4 appropriate.

5 SPEAKER 3: Your Honor, Nicholas Ferland for
6 cardinal capital. And that objection has been
7 withdrawn, or shall be drawn.

8 THE COURT: All right. Very good.

9 MR. GALARDI: Let him set precedent here. He
10 was just scared of my response, Your Honor. I know
11 him too well.

12 The next matter is the objection of -- I
13 think it's Balogh companies. It's objection C. My
14 understanding is that's going forward.

15 THE COURT: All right.

16 SPEAKER 3: I carry that, one, too.

17 MR. GALARDI: All right.

18 SPEAKER 3: Nicholas Ferlan for the Balogh
19 companies again. That objection is also withdrawn.

20 THE COURT: All right. Very good.

21 MR. GALARDI: You wouldn't happen to
22 represent the Leben family, too, would you?

23 Objection D is the objection of the Leben
24 family. I have that one as going forward.

25 SPEAKER 3: Good afternoon, again, Your

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1 Honor. Jen McLemore for the Leben family limited
2 partnership. As I understand it, the subtenant in
3 this case paid both November and December rent
4 directly to the debtors. And the Leben family
5 limited partnership is asking that rejection be
6 effective January 1 to preserve the rights that they
7 have to try and collect these obligations. We just
8 want to preserve an administrative claim because
9 clearly the debtor has collected rent from the
10 subtenants, but they have not bothered to pass it on
11 to us at some point. And that includes taxes and
12 some of the other issues. We're trying to preserve
13 our own rights because we're not sure exactly where
14 we stand in this situation.

15 THE COURT: All right. Your issue being that
16 you just want to collect whatever rents were paid to
17 the debtor post petition?

18 SPEAKER 3: We would. Alternatively, we
19 would also -- if we have the rejection effective
20 January 1, it would give us the rights to
21 administrative claims during those time periods, and
22 it might clean up the issue.

23 THE COURT: All right. But if I grant the
24 motion to reject, then the at the time or wouldn't
25 be entitled to keep the rents, would he?

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1 SPEAKER 3: Well, at this point, part of the

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2 problem with that is collecting it back. As we
3 understand, the debtors were going to pay the
4 December rent, no questions asked.

5 But the November rent leaves us in a
6 precarious position because they have collected all
7 of November's rent, and they've just left us with --
8 they've told us we are entitled to file an admin
9 claim for the November rent, but they may or may not
10 take issue with it down the road because they will
11 have rejected it effective November 10. So they
12 will have all the money for it. and it puts
13 them -- I believe Mr. Galardi even referred to it at
14 the last hearing as sort of a windfall situation.
15 We don't know where we stand under that
16 circumstance. So the cleaner resolution from my
17 client's perspective is to have the rejection
18 effective January 1.

19 THE COURT: All right. Thank you.

20 MR. GALARDI: Your Honor, I think the cleaner
21 perception would be what I think I had offered at
22 the last hearing. Your Honor, we clearly did
23 collect November rents, and we collected that pre
24 petition. But it is less than -- I believe it is
25 less than the amount of rent that we would pay. And

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1 I did describe that as a windfall for November. So
2 that's not a disagreement.

3 With respect to December, what we have
4 offered people is that if we did, in fact, receive
5 the December rent from the subtenant, we would turn

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6 that rent over because our position is these leases
7 were rejected as of November 10th. There is no
8 dispute as to our giving notice to both the
9 subtenant and the tenant on these matters. So we
10 think under the case law the effective rejection at
11 a time is November 10th. I have no problem with
12 their reserving a right to a certain administrative
13 claim for any of the November rent if they so
14 choose, but didn't think having it effective January
15 first is really the proper date. I think we
16 complied with the court's order. We gave notice. I
17 don't think there's a dispute about that. We would
18 like to have it rejected as of November 10th, all
19 rights reserved to administrative claims for any
20 rents we collected and then with respect to this one
21 in particular, if we collected December rent, it was
22 what I said on the record the last time. We would
23 be turning over any sub rent we got for the month of
24 December and we will pay that over to the tenant.
25 We were not intending to try to keep that money.

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1 THE COURT: All right. Very good.
2 Ms. McLemore, I'm going to confirm the rejection as
3 of November 10, but reserve your right to make an
4 administrative claim for the November rent, in
5 whatever fax you deem appropriate.

6 SPEAKER 3: Thank you.

7 MR. GALARDI: Your Honor, that then moves to
8 objection E, which is the objection of inl and U.S.

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management LLC. My understanding is that's going
10 forward.

11 SPEAKER 3: Jen McLemore for inl and U. S.
12 management. That actually has been resolved.

13 THE COURT: Okay. Very good.

14 MR. GALARDI: Your Honor, the next objection
15 is objection F, which is the limited objection of C
16 K Richmond business. I have this matter as going
17 forward. I don't know if it was resolved during the
18 break.

19 SPEAKER 3: Your Honor, Chris Perkins. This
20 matter has been withdrawn.

21 THE COURT: It's been resolved?

22 SPEAKER 3: We're withdrawing the objection.

23 THE COURT: Withdrawn. Okay. Very good.

24 MR. GALARDI: Your Honor, I'm now up to
25 objection G, which is the objection of inl and
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1 commercial property. My understanding is this was
2 resolved over the break.

3 THE COURT: We should have more breaks.

4 MR. GALARDI: Your Honor, I am now up to
5 objection H, which is the objection of Carrolton
6 Arms. I have this matter as going forward. I don't
7 see counsel here.

8 Your Honor, this is a -- my understanding is
9 that there is no dispute that we handed over the
10 keys on November 10th, or pursuant to the November
11 10th order. I think that their position was that we
12 had not surrendered the premises because the

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13 sublessee continued to occupy the premises; and
14 again, we were obligated to remove the sub lessee's
15 property from the premises. Your Honor, again, we
16 think under the case law that if we gave unequivocal
17 notice to both the sub lessee and the overlord, that
18 that was an effective rejection. We did so on
19 November 10th. I don't think there was a factual
20 dispute with respect to that. We'd ask that that
21 objection be over ruled.

22 THE COURT: The objection is over ruled.

23 MR. GALARDI: Your Honor, the next one is
24 objection I, which is the premier retail interiors
25 objection. Is it resolved?

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1 SPEAKER 3: Your Honor, Jen McLemore for
2 premier retail interiors. I understand from my
3 client's perspective this has been resolved, but
4 there is another party in interest -- I don't know
5 if they're here -- Mr. Bailey represents potentially
6 another party in interest. I believe he has filed
7 something to reserve his rights, but my client has
8 resolved this issue.

9 THE COURT: This is only the objection of
10 your client?

11 SPEAKER 3: Correct.

12 THE COURT: And it's been resolved?

13 SPEAKER 3: Correct.

14 THE COURT: All right.

15 MR. GALARDI: Your Honor, the next objection

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16 is the objection of generation one, which is
17 objection J on my agenda. I have that matter going
18 forward.

19 SPEAKER 3: It's resolved.

20 MR. GALARDI: It's resolved. You can stay up
21 here and just resolve them all. I have no problem
22 with that. So J is resolved.

23 The next objection is the objection of Dick's
24 sporting goods. We have continued that to January
25 29th.

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1 Now, on to objection L, which is the limited
2 objection of Golf galaxy. That is also -- the
3 parties have agreed to adjourn that matter over to
4 January 29th.

5 SPEAKER 3: Your Honor --

6 THE COURT: Yes.

7 SPEAKER 3: Good afternoon, Your Honor. My
8 name is Daniel Kerrigan. I'm here on behalf of
9 actually matter 0 under this matter, and matter 25
10 further on in the docket. I understand that
11 apparently golf galaxy, which is our client's
12 subtenant, apparently has agreed to adjourn the
13 hearing on this particular matter till January 29;
14 is it?

15 MR. GALARDI: Yes.

16 SPEAKER 3: And I think if you look at matter
17 0, we're listed in the same box, essentially,
18 probably because we joined in their objection as
19 opposed to filing a separate one. However, the

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20 docket -- the agenda was the first indication I had
21 that we had agreed to adjourn it. I don't have an
22 objection to adjourning it; however, it does tie
23 into matter 24 -- or rather, matter 25, because it's
24 the same issue at least as to payment of the stub
25 that flows throughout. Maybe by the time we get to
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1 matter 25, it may not matter. But at least I'd like
2 to preserve that piece of the objection.

3 MR. GALARDI: No problem.

4 THE COURT: It's preserved.

5 SPEAKER 3: Thank you, Your Honor.

6 MR. GALARDI: Your Honor, matter number --
7 letter M, I guess, is the next one that I am up to.
8 It's the O L P 6609 grant. That objection has been
9 resolved.

10 THE COURT: All right.

11 MR. GALARDI: The next matter I have is
12 objection N by dollar tree stores. That, the
13 parties have agreed to adjourn that over to the
14 January 29th hearing.

15 THE COURT: Very good.

16 MR. GALARDI: Objection O, which was the
17 joinder of the landlord to 120 -- I guess that's
18 what we just addressed where we're agreeing to
19 adjourn it as a joinder.

20 The objection P which is the limited
21 objection of Melvin Walton Hone. My understanding
22 is I have resolved that. Counsel is in the

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23 courtroom.

24 SPEAKER 3: Good afternoon, Your Honor.

25 David Pollock on behalf of Melvin Hone, trustee.

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1 This matter was resolved I think on the record at
2 the hearing on December 5th.

3 THE COURT: Very good.

4 MR. GALARDI: Your Honor, that brings us to
5 letter Q, which is the objection of bond C C 1
6 Delaware business trust. My understanding is that
7 that objection has been resolved. So she doesn't
8 have to -- she's nodding her head yes.

9 THE COURT: It's resolved.

10 MR. GALARDI: Thank you.

11 That was Q. Now I have objections R and S.
12 Objection of manufacturer's trading to the debtor's
13 motion to reject. That matter is going forward.
14 And then I have an objection and joinder in the
15 objection to manufacturer trust. both of objections
16 are going forward.

17 THE COURT: All right.

18 SPEAKER 3: Food afternoon. Jen McLemore for
19 manufacturers and traders trust company. Your
20 Honor, manufacturers and traders is a trustee in a
21 securitized investment related to 41 different
22 leases. And at the moment -- this is somewhat
23 complicated -- the landlords in the stores have
24 given all of their rights up to us to protect them.
25 And at the moment we are unable to determine when

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1 debtors may or may not have left the premises. So
2 we filed a place holder objection to pre serve while
3 we try to figure out who's in and who's out and
4 when. And we're still in the process of doing that.
5 So while this is going, maybe we can carry it over.
6 I apologize. I didn't ask to do this earlier. That
7 may be the best resolution.

8 THE COURT: So you're not aware of whether or
9 not the debtor has left your premises.

10 SPEAKER 3: For the places that they're
11 trying to reject we're at the moment still trying to
12 figure out when exactly they left T. communication
13 between the trustee for these investments, it's a
14 bit of a convoluted connection between the landlers
15 and the trustee. So they're trying to do their due
16 diligence and figure out what exactly has happened
17 at the locations --

18 THE COURT: Mr. Galardi, do you have any
19 objection to continuing this out to January 29?

20 MR. GALARDI: Your Honor, I guess I don't.
21 We do have a witness that would testify that we
22 turned over the keys, that these premises are
23 vacated, and that we complied with your first day
24 order with respect to November 10th. So I'm not
25 sure adjourning it does anything more than keeping

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1 space on the agenda.

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2 THE COURT: If you want to proceed on it, I'm
3 prepared to listen to it this afternoon.

4 SPEAKER 3: Honestly, I can't refute -- if he
5 has evidence for it, I don't have anything --

6 MR. GALARDI: Why don't we adjourn it for the
7 time being, and I'll let her talk to our witness so
8 that we may be able to resolve this.

9 THE COURT: Okay. So we'll just drop it down
10 on the docket.

11 MR. GALARDI: We'll just drop it down to
12 later, Your Honor. Thank you.

13 Your Honor, that leaves us with the final
14 objection on this matter, which is the joinder
15 Galleria plaza. And my understanding is that that
16 has been continued over to the January 29th hearing.

17 THE COURT: All right. That finishes those
18 matters. Your Honor, now we have a series -- and
19 probably it is -- it is -- there are a number of
20 matters that are now on the agenda from 8 on that go
21 to, I think, one fundamental issue. So for the sake
22 of clarity and argument, I think there's a legal
23 issue and then we can get into details.

24 Your Honor may recall -- and then I'll let
25 each party come up and make their arguments --

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1 obviously the law with respect to stub rent, which I
2 think is the only issue that is really open,
3 although I'll reserve everybody's rights to come up
4 and argue there may be taxes or something. The big
5 issue that has come up is that we -- I don't think

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6 anybody disputes we did not pay our November first
7 rent when it was due and payable. Now, we have gone
8 through some growing pains, so to speak, through the
9 month of no because as we found out and has been
10 determined, some rents weren't due November first;
11 rather, they were due at the end of November and
12 paid in arrears. it's at least our understanding
13 that we have paid all of that represent in arrears
14 unRes somebody has refused to accept it. But we
15 have only paid what I call the stub rent period, the
16 period from November 10th to November 30th. As I
17 stood before Your Honor at I think it was the
18 December fifth hearing, I advised Your Honor that we
19 would agree with the objecting landlords that the
20 accrual method applies. I think that's -- the
21 accrual method is the method that this court has
22 used in prior cases to assess whether there is a
23 post petition obligation to pay rent. So we've
24 reserved our rights on billing date with respect to
25 other landlords, but with respect to landlords that

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1 raised objections we have agreed to the accrual
2 method. We also agreed, Your Honor, that
3 notwithstanding the fact that they filed motions --
4 now having read the track auto case a little more, I
5 now understand better why they wanted this -- the
6 mere fact they didn't go forward the first time on
7 these motions does not prejudice in any way the
8 timeliness of their request for an administrative

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9 cl ai m.

10 So what I think we are faced with today, Your
11 Honor, with a lot of them -- and we can take a legal
12 argument first and then also a factual argument --
13 is whether or not the period of time November 10th
14 to November 30th, one, I think we have agreed with
15 the accrual method that sit an administrative claim.
16 So really the only issue is when do you have to pay
17 that claim? We have taken the position that we are
18 not required to pay it, that it is an administrative
19 claim and can be paid under 507 A and 1129 A 9 A at
20 the end of the case. The landlords want timely
21 payment, and want timely payment now. I do have a
22 witness in court today that could testify with
23 respect to the DIP and the need and the financial
24 availability. And I could put that proffer
25 testimony on. That probably doesn't necessarily --

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1 there's to ways Your Honor could see it. If Your
2 Honor sees it as a simple legal issue, that it's 365
3 D 3 has to be paid now, pay it, doesn't matter what
4 our DIP budget says, what our financial availability
5 is, you have to pay it now. Or Your Honor can see
6 as I read track auto that Your Honor has some
7 discretion with respect to that, that with respect
8 to anything post December, we have to pay that under
9 365 D 3. But Your Honor could have discretion and
10 say I understand that this was actually something
11 due and payable pre bankruptcy. We have this
12 fiction calmed the accrual method which does it

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13 every day, but that I can, in fact, have the
14 discretion as to the timing of that payment since it
15 is an administrative claim. And I can pay it at the
16 end of the case or I can order you to pay it
17 under the circumstances at the present time during
18 the case.

19 The debtor's position is it is a matter of
20 your discretion, that you can order us today to pay
21 it; but you can also order that it not be paid today
22 and leave to it the circumstances, whether it be
23 paid at the plan period of time or any day sooner.

24 The respect to the testimony of the witness,
25 if called to testify on our behalf, Mr. Steve Kyle
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1 man with F D I would testify that the budget we
2 submitted both in interim and that we have been
3 using to the final budget did not include the
4 payment of sub rents for those leases that was due
5 November first to cover the November period. As
6 Your Honor heard this morning, he would also testify
7 that performance of the business has been weak over
8 the course of the first six weeks of this case where
9 same store sales or margins of sales have fallen 40
10 to 48 percent. That if called -- if required to pay
11 the sub rent, the sub rent obligation that is out
12 stand together many of these landlords is
13 approximately 20 to 25 million dollars. Mr. Cook
14 would also testify that in the negotiations that
15 Your Honor heard about this morning between the

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16 committee, the bank group, and the debtors, there
17 was a discussion and negotiations regarding
18 increased availability which Your Honor heard today
19 taking out the minimum availability covenants but
20 Mr. Cool Um would also testify that the negotiations
21 were to increase availability to pay current pay
22 obligations, but not to include sub rent. Indeed,
23 Mr. Cool Um would further testify that in the event
24 that the court orders the debtors to pay sub rent,
25 it is not permitted under the current DIP facility
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1 to pay it; and that we would have to go back to the
2 required lenders and could cause a default. Either
3 we'll be in default of the order, or we'll be in
4 default of the DIP. And we can have no assurances
5 that the DIP lender -- the required lenders that
6 would be required to pay it would approve such a
7 payment.

8 Your Honor, Mr. Cool Um would also testify
9 that over the next six weeks as we try to get to a
10 restructuring scenario, liquidity is tight and
11 unpredictable; and that, therefore, that at least
12 for the period of time for the next six weeks or to
13 the end of January, that is in the best interest of
14 the debtors to maintain its availability and not to
15 pay the sub rent.

16 That would be the testimony. I'd pass him on
17 as a witness, Your Honor, to anyone. But I think
18 most of this comes down to a legal issue.

19 THE COURT: Does any party wish to cross
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20 examine Mr. cool Um?

21 SPEAKER 3: Yes, Your Honor.

22 THE COURT: Mr. cool Um, if you'd come
23 forward and be sworn, please.

24 (Witness sworn).

25 SPEAKER 3: Daniel Kerri gan, Your Honor,
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1 Canal og and Aldridge for the orchard land lords.

2 THE COURT: All right. You may proceed.

3 SPEAKER 3: Thank you, Your Honor.

4 Q. Good afternoon, sir. How are you?

5 A. Fine. Thank you.

6 Q. Thank you. You indicated that the -- the
7 proffer indicated that --

8 THE COURT: You might want to identify the
9 witness.

10 BY SPEAKER 3:

11 Q. I'm sorry. Could you identify yourself,
12 please?

13 A. Sure. Stephen cool Um with FTI consulting.

14 Q. And what function do you perform for the
15 debts or?

16 A. I'm a senior managing director with FTI, and
17 FTI is the financial advisor to the debtors.

18 Q. How long have you served in that capacity?

19 A. We were originally hired by the company in
20 mid August and continued on since then.

21 Q. I'm sorry, since what date?

22 A. Mid August.

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- 23 Q. Of this year, 2008?
- 24 A. That's correct.
- 25 Q. And you indicated that there was -- or the
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- 1 the proffer indicated that there was a budget and a
2 revised budget perhaps that had been submitted to the
3 lenders; is that correct?
- 4 A. Just the original budget that I think was
5 presented to the court on the first.
- 6 Q. Did you have any part in creating that
7 budget?
- 8 A. I did.
- 9 Q. Were you the principal person in creating
10 that budget?
- 11 A. The principal person from FTI, along with the
12 company.
- 13 Q. And who else at the company?
- 14 A. A number of people from the company's finance
15 staff and other parts of the organization.
- 16 Q. The chief financial officer, would that be
17 one of them?
- 18 A. That's correct.
- 19 Q. All right, sir. And how far in advance did
20 you create this budget -- of the bankruptcy filing, that
21 is?
- 22 A. The DIP budget was created, you know, within
23 a week of the bankruptcy filing and finalized
24 immediately prior to the file.
- 25 Q. So November 3rd it was created?

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1 A. We worked on the final version from November
2 3rd up until the time of filing.

3 Q. And prior to that, when did the drafts of the
4 budget begin?

5 A. I don't recall the exact date.

6 Q. Before November 1?

7 A. Yes.

8 Q. At any time with -- do you understand what
9 the term stub rent mean?

10 A. I do.

11 Q. Was that discussed in putting together your
12 final budget?

13 A. It was.

14 Q. Was it discussed in putting together the
15 prior versions of that budget?

16 A. It was discussed in the final week leading up
17 to the last budget. I don't recall the date.

18 Q. Could it have been before November 1?

19 A. I just don't recall.

20 Q. At what point did you know that the November
21 1 rents would not be paid to the landlord?

22 A. At the end of October at the time when
23 company would typically begin to issue the checks, we
24 knew that we wouldn't be paying the November first rent.

25 Q. And you also knew that the company would be
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1 accepting the rental payments from the subtenants at

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2 that point, but not returning it?

3 A. We assumed that we would continue to get
4 rents from the subtenants, but didn't know for sure.

5 Q. And did you also assume that you wouldn't be
6 re paying that sub rent to the subtenants?

7 A. At that point in time it wasn't certain that
8 we would file for bankruptcy.

9 Q. It wasn't certain on October 31st that you
10 wouldn't file for bankruptcy?

11 A. No.

12 Q. When did it become certain?

13 A. The company was working on several things.
14 And it hoped to avoid filing for bankruptcy, but
15 ultimately did file on the date that it did.

16 Q. What things in between October 31 -- what
17 change between October 31 and November 10?

18 MR. GALARDI: Your Honor, I don't want to --
19 I think this goes outside the scope of the direct
20 proffer as to the simple budget aspects. I'd object
21 to the line of questioning.

22 SPEAKER 3: May be heard, Your Honor.

23 THE COURT: Yes, you may.

24 SPEAKER 3: Your Honor, the argument that's
25 being made is that the court has discretion. Part

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1 of that argument is basically what it boils down to
2 is the debtor can't get the money from the lenders,
3 and if the debtor is required to pay the sub rent,
4 that there's going to be a default under the line --
5 under the DIP facility. Now, did they know ability

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6 it going in or did they know about it going out?
7 Was there a -- was there an expectation that they
8 would be able to get this sub rent in and put it
9 into the system and rely upon it and at the same
10 time not pay the November 1 rent when they went into
11 this exercise? It seems, given the timing, that
12 that is quite material to this whole exercise,
13 because if they -- if the parties to the bankruptcy
14 came in and planned on not paying the rent -- which
15 it appears that they did not -- and they also
16 planned on accepting the sub rent, then it's a
17 little disingenuous to say it's not in the budget
18 anymore, because that was the plan.

19 THE COURT: All right. Mr. Galardi --

20 MR. GALARDI: Your Honor, just briefly. I
21 didn't realize we were going to argue the subrent.
22 On the subrent point, Your Honor, I think he may
23 have an equitable argument that he can raise in the
24 individual circumstance. I think that the direct
25 testimony simply went to whether as a general matter

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1 equitably we have to pay that rent. If he's trying
2 to raise, I would ask him to put on a witness about
3 the sub rent. But I didn't have the direct
4 testimony to what the -- whether we were collecting
5 the sub rent, and whether that was a basis for not
6 paying the sub rent. We collected it. We
7 understand that. We understand the equitable
8 argument. But I'm not sure how that relates to

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9 whether we have to pay the stub rent in this
10 circumstance under -- well, I know I'm not being
11 articulate here. I think it goes outside the
12 direct, Your Honor, because the issue is not whether
13 we received the sub rent. It's whether we have the
14 ability right now to pay the stub rent, whether or
15 not we collected that rent, which was a DIP budget
16 item, which is the sole basis of the direct
17 testimony.

18 THE COURT: And I believe that he could be
19 called as his own witness, too. So I'm going to
20 allow this line of questioning. But let's try to
21 tailor it to the specific items that you were
22 talking about.

23 SPEAKER 3: Yes, Your Honor.

24 THE COURT: So the witness may answer.

25 Q. Do you recall the question?

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1 A. Could you repeat it, please?

2 Q. Could you read it back, please?

3 (Last question read back)

4 A. We finalized the budget between October 31st
5 and the 10th. And the assumption was that we would
6 collect the sublease income and we would not pay the
7 stub rent.

8 SPEAKER 3: Thank you, sir. Appreciate it.

9 THE COURT: All right.

10 SPEAKER 3: Thank you, Your Honor.

11 THE COURT: Any other party wish to cross
12 examine this witness? All right. Mr. cool Um, you

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13 may step down. Thank you, sir.

14 THE COURT: Mr. Galardi, will there be any
15 further evidence?

16 MR. GALARDI: No, Your Honor.

17 THE COURT: Does any other party wish to put
18 on any evidence? All right. Well, then, I'll hear
19 your arguments.

20 MR. GALARDI: Your Honor, again, I think that
21 the track auto case directly addresses this point.
22 What the landlords were seeking the payment of the
23 stub rent period is essentially a super priority
24 claim. What the court ruled in track auto was yes,
25 landlords cannot sit on their rights. They must
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1 make these motions to compel. We have no objection
2 to that. We have no objection to saying it's an
3 administrative claim. The question is when the
4 timing of that payment is to occur. By seeking the
5 current payment of it right now, Your Honor, we
6 think that they are seeking a super priority claim,
7 a priority claim that would be paid before even the
8 banks and secured creditors. As the banks were
9 entitled to the funding, they didn't provide for
10 that in the budget. And as to the actual
11 circumstances right now, it would actually have a
12 negative effect on the estate. And Your Honor, we
13 would ask Your Honor to rule that such payments can
14 await either a further order of the court or
15 confirmation of the plan to be paid under 507 A, and

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16 is not entitled to be treated as a super priority
17 claim, to be paid first in line at this time.

18 THE COURT: Mr. Galardi, are you giving up
19 your argument that this court should consider the
20 fourth circuit unreported decision in roses stores
21 case that the payment should be triggered by
22 contractual obligation as opposed to the accrual
23 method.

24 MR. GALARDI: Your Honor, for -- yes, we will
25 give up that argument to go with the accrual method,
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1 Your Honor. Having then just looked at another
2 opinion out of the southern district of New York, we
3 believe that the accrual method is obviously the
4 most fair and easy to calculate. The billing date
5 creates all sorts of problems. So I think in this
6 case, as I said with the first landlord, Your Honor,
7 we'll follow the accrual method in governing this
8 case.

9 THE COURT: All right. Very good. Thank
10 you. Anybody wish to reply?

11 SPEAKER 3: Good afternoon, Your Honor.
12 David Pollock on behalf of various landlords noted
13 of record. I think when I'm finished also on behalf
14 of several of my colleagues here this afternoon.

15 I guess I made a mistake this morning when
16 Mr. Galardi and I were emailing and he said he
17 agreed and I said we agreed all too much on this
18 issue we don't agree. I don't know if Your Honor --
19 I know if you heard the part where we suggested on

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20 our panel that maybe Montgomery ward ought to be
21 over ruled because, in fact, proration was the --
22 really the fair and the equitable way. Since we've
23 passed that point in this case, I don't think we
24 need to argue it. I think the issue comes down to
25 really a legal argument, as Mr. Galardi suggested.

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1 The legal argument is payment now or payment later.
2 The payment later approach is really the
3 administrative claim approach. And the
4 administrative claim approach is one that comes up
5 under the billing date approach where the Court such
6 as Judge Shante in Goody's case cited in our
7 pleading says yes, even though it's a billing date
8 approach, you can still have an administrative
9 claim, but it's a timing issue.

10 We're no longer -- and this is where
11 Mr. Galardi and I disagree -- we're no longer at a
12 timing issue because he has agreed that this is a
13 proration, an accrual method. Proration accrual
14 method, we then look to the statute. And the
15 statute says you pay the obligations timely.
16 Timely. We're not in the issue of: Oh, this is an
17 admin claim and you get a 507 claim later on. You
18 pay timely. There's one exception to the timely in
19 3605, Your Honor. That exception is the court on a
20 motion of the debtor may extend the time to pay of
21 a period of 60 days but not beyond that 60 days. So
22 the section already addresses when payment gets paid

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23 if you are making payment under 365. And we are
24 making, as the debtors have agreed, payment under
25 365. So the question then is do we get paid today

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1 or does Your Honor consider the proffer as a request
2 for an extension till the end of the 60 days and
3 give the debtors until January 8th or January 9th to
4 make the payment. That, in our mind, is the only
5 decision. It is a timing issue, yes, but it is not
6 a timing issue of an administrative claim. 365 says
7 you timely pay the obligations. They have agreed
8 that that applies, and that it is the proration
9 approach. Given that, we don't get into
10 administrative claims. We don't get into the
11 discretion. The only discretion in our mind that
12 the court has is: Do I order payment today or do I
13 order payment by the end of the 60-day period,
14 assuming for the sake of argument, an oral motion
15 has been made to grant that extension. Very simple
16 argument, Your Honor. I don't think any more really
17 needs to be said on the issue. It's not an
18 administrative claim. They've given up that issue.
19 It's a payment under 365 on a proration basis. And
20 what is equitable is that they pay for the period of
21 time. My clients roughly -- I don't know -- 29.
22 Some of them rejected. We're talking a half a
23 million dollars or so in rent. I understand the
24 debtors dilemma, but that's a dilemma that this
25 court doesn't need to face that the debtor needed to

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1 face and the billion dollar lender needed to face.
2 They're using property -- they used property. They
3 should have taken that into consideration. I've
4 been before many a bankruptcy court where the court
5 has said, this is not the place to arrange the
6 financing. You need to arrange it before you come
7 here. And that's what they needed to do. GE or the
8 lending group can decide, well, yeah, we want this
9 case to go on. We're going to put that into the
10 budget. Or they can decide not to. But that's not
11 the issue before the court. The issue before the
12 court is simply what does 365 say in light of the
13 debtor's concession that this is, for the purposes
14 of this case, a proration accrual method case.

15 And that's our argument, Your Honor. Thank
16 you.

17 THE COURT: Thank you.

18 SPEAKER 3: Your Honor, A C Epps, Jr. from
19 the firm of Christian and Barton. We have filed
20 several dozen landlords. And Mr. Pollock was
21 specifically authorized to make the argument on our
22 behalf today. Thank you very much. Our clients
23 adopt it. Thank you.

24 SPEAKER 3: Good afternoon, Sheila del
25 cruise, counsel for Woodlawn trustees, Inc, 212 LLC
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1 and zeal limited liability company. My clients are

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2 in a very similar situation as Mr. Pollock's
3 clients. And we concur with Mr. Pollock's argument,
4 and authorize him to make the same for our clients.

5 THE COURT: All right. Thank you.

6 SPEAKER 3: Good afternoon, Your Honor.

7 Michael can deal is on behalf of coal C C in Florida
8 LLC and coal CC aurora company LLC. We have motions
9 to compel payment before the court on both of those
10 as well.

11 A lot of the points that I wanted to make
12 were said previously, that it is 365 D 3 that really
13 controls in this instance. If you look at track
14 auto, Your Honor, that has no real application here
15 because the facts are distinguishable. And that
16 involved a situation where the debtor did sleep on
17 its rights after rejection came, they came in and
18 asked for 365 D 3 rights for payment immediately of
19 the amounts that were owed. And the court found
20 that that wasn't appropriate at that time, and that
21 they, if anything, were just entitled to an
22 administrative claim. So in this instance, we're
23 coming under 365 D 3 which requires the debtor to
24 perform under the lease for all post petition -- for
25 all obligations that are due under the lease.

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1 THE COURT: It says that the debtor shall
2 timely perform. That doesn't say -- what does
3 timely mean?

4 SPEAKER 3: Well, the courts have been clear
5 on what timely means. It's to perform in accordance

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6 with the terms of the lease agreement. And that's
7 all we're asking that be done in this instance.

8 The original objection to the motions to
9 compel payment that were filed previously by the
10 different landlords in this case, and that were
11 heard at the prior omnibus hearing, had an objection
12 filed to it, as Your Honor correctly pointed out,
13 citing extensively the roses fourth circuit decision
14 and other authority taking a billing method approach
15 in this case. And the reason was because they
16 wanted to cut off as much of the pre petition rent
17 that was due as the vast majority of leases no doubt
18 are on the first day of November. So they cut off
19 the rent that was due on November first, and only
20 for those people that came in and paid their
21 attorneys to come in and object did they then decide
22 to give them accrual rent going forward. So that
23 double position is being taken in this case. The
24 debtor has gotten the advantage of a billing method
25 approach, unless that order is to be rescinded if

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1 now they switch positions and say an accrual method
2 is appropriate, then we ought to be consistent and
3 the the law of the case ought to be what they
4 previously drilled down most of the the tenants
5 under with regard to a billing method approach. And
6 that ought to be what's adopted as reflected by the
7 unpublished decision of the fourth circuit. So I
8 think it's unreasonable for the debtor in this

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9 instance to be initially arguing extensively in
10 subjection of billing method approach and now after
11 its gotten the benefit of that to turn around and
12 say we really meant an accrual approach and now
13 talking about end of the month stub rent instead of
14 beginning of the month stub rent, we're going to
15 take the other position and beat down the right hand
16 lords in that instance so that they're not entitled
17 to the full month's rent.

18 THE COURT: All right. Thank you.

19 SPEAKER 3: Thank you, Your Honor.

20 SPEAKER 3: Good afternoon, Your Honor,
21 William gray for a number of the landlords that are
22 also part of this argument. I agree with what has
23 been said prior to me. I would just emphasize, too,
24 about the part that if we're not in the billing
25 method jurisdiction -- we're in the accrual -- the
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1 billing method is when you kick over to preserve or
2 fill the gap. And certain cases have said fill the
3 stub rent gap; then look to the 503 and then expense
4 claim. We don't get there. This should be the 365
5 D 3 only.

6 There was a very recent case this past week
7 in the southern district of New York, judge Gropper.
8 That decision is mostly billing or accrual. And I
9 would commend that to Your Honor's reading. It's
10 2008 Wes law 5265739. Judge Gropper does discuss
11 also about a fair reading of due and payable after
12 the petition date is that it accrues every single

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13 day. And judge Gropper also talks about the
14 jurisdictions that do the billing date. And they
15 fill the gap by the 503. But that contradicts 365 D
16 3 that has the notwithstanding 503. You shouldn't
17 require landlords to get into the 503 discussion
18 part there.

19 As to super priority claim, also, Your Honor,
20 I would mention I did not hear anything here that
21 there's any risk of administrative insolvency which
22 I believe, for example, judge Tyson's packaging
23 case, a fair reading of that indicates he concerned
24 about some order sort of administrative insolvency.
25 So I don't believe we need to go to that, either for
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1 all those reasons we do ask that you check check
2 tape -- right here you enter an order that says they
3 must pay the stub rent so we don't get into
4 asserting it later.

5 THE COURT: So you don't think I should
6 follow the rule that judge Tyson previously
7 established?

8 SPEAKER 3: Well, again, Your Honor, I don't
9 think that is totally applicable again because
10 there's no evidence here that we're on the verge of
11 any kind of administrative insolvency.

12 THE COURT: All right. Thank you. You think
13 that that's the only standard is administrative
14 insolvency, as opposed to taking into consideration
15 liquidity issues.

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16 SPEAKER 3: If you get to the 503, Your
17 Honor, my point is that you don't get there. 365 D
18 3, all of the landlords here have timely made their
19 demand for it. And so, we shouldn't be put into the
20 503 box.

21 THE COURT: Okay.

22 SPEAKER 3: Good afternoon, Your Honor. R A
23 Stein on behalf of Annapolis plaza LLC. We have
24 filed a motion to compel payment under 365 D 3. And
25 again, not to belabor the points previously made by
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1 counsel, I join in all those arguments. I believe
2 Your Honor had pointed out -- asked the question
3 about timely performance, what does timely mean.
4 There's several cases that speak to that. And I'll
5 just cite one, the child world case, which is 161 B
6 R 571. And that case says explicitly that sections
7 365 D 3 fictions the amount to be paid by the debtor
8 pend willing assumption of rejection of the lease at
9 that time amount provided in the lease and requires
10 these payments to be paid at the time required in
11 the lease. So timely performance, I believe, under
12 365 D 3 requires the debtor to make payments, you
13 know, now as opposed to waiting till further order
14 of the court or confirmation of the plan as the
15 debtor would request.

16 THE COURT: That long would suggest that you
17 would make the payment on November 1, and then not
18 again until December 1 when the payment would be
19 due. That was what I was asking Mr. Galardi, if he

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20 was giving up that argument and going with the
21 accrual method. If we're doing the accrual method,
22 don't we really have a legal fiction that we're
23 creating saying that we've created a block of time
24 in which we're going to say is due to the landlords.
25 But then we said it's timely performance. What
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1 does that mean? That was what my question
2 was coming -- when does the debtor have to perform
3 that legal fiction obligation?
4 SPEAKER 3: Obviously, it can't be as timely
5 as was required under the lease because that time is
6 long gone.
7 MR. GALARDI: Right.
8 SPEAKER 3: But better late than never.
9 THE COURT: So I have to set it for some
10 time?
11 SPEAKER 3: Yes.
12 THE COURT: And you're saying I should set it
13 for now?
14 SPEAKER 3: Yes.
15 THE COURT: And I guess when I keep
16 looking -- everybody says I have to look at the
17 statute. But I don't see where in the statute it
18 tells me -- it's just not that clear to me.
19 SPEAKER 3: Well, I guess I can agree that
20 this section of the code together with many other
21 sections could have been written a bit more clear,
22 but I guess we have -- we have to deal with what we

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have to deal with.

24 THE COURT: All right.

25 SPEAKER 3: Just one other issue. I don't
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1 think it's been dealt with yet. I'm not sure if
2 it's going to be dealt with separately. We also
3 asked for payment of attorney's fees. Under track
4 auto 0 we believe that's required to be paid as part
5 of the stub rent. And I don't know if the
6 debtors -- I believe the debtor's position is that
7 it's not to be paid now. I don't know if we want to
8 argue it now or later.

9 THE COURT: You can argue it if you like.

10 SPEAKER 3: I mean, I don't think it's much
11 of an argument. I think under track auto where the
12 lease provides for attorney's fees, we will uphold
13 the terms of the contract. The lease between
14 Annapolis plaza and the debtor specifically provide
15 force attorney's fees in this kind of situation; and
16 therefore, we believe that, in addition to the
17 amounts owed under the -- for the actual lease
18 there's also our attorney's fees which need to be
19 paid under the bankruptcy code.

20 THE COURT: And what specifically does the
21 lease say with regard to obligations to pay
22 attorney's fees.

23 SPEAKER 3: I don't have it up here with me.
24 I have it back there. But it says in the event that
25 there is a -- that the lessor needs to take any

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1 action to enforce payment of the rent, the lessee
2 agrees to be liable for all reasonable expenses
3 incurred in prosecuting that action, and it
4 explicitly includes attorney's fees.

5 THE COURT: Okay. Thank you.

6 SPEAKER 3: Good afternoon, Your Honor. Paul
7 Bliley. I represent several of the landlords:
8 Burbank mall associates, crown C C I, hey ward 880,
9 LLC, save mart supermarkets, C C investors 1997 and
10 the luck now landlords. I join in Mr. Pollock's
11 argument.

12 THE COURT: All right. Thank you,
13 Mr. Bliley.

14 SPEAKER 3: Good afternoon, Your Honor.
15 Malcolm Mitchell on behalf of Polaris, Circuit City
16 LLC. I believe, Your Honor, with regard to this
17 timely issue -- timeliness issue, that section 365 D
18 3 does, in fact, talk to or speak to -- it says
19 timely perform all obligations of the debtor. It
20 does say that the court may extent for cause the
21 time for performance of any such obligation that
22 arises within 60 days after the the date of the
23 order for relief, but the time for performance shall
24 be extended beyond such -- sorry. But the time for
25 performance shall not be extended beyond such 60-day

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1 period. So I believe, Your Honor, and submit to

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2 you, that it is clear that the legislature spoke to
3 the issue of timeliness so that if it comes due --
4 if the obligation arises as has been conceded on the
5 accrual basis as counsel for the debtor has
6 conceded, the obligation arose on November the 10th
7 for the stub rent, and the furthest that could be
8 extended would be for 60 days. And so, for the rent
9 that comes due for the period November the 10th
10 through November the 30th, we would submit that, as
11 has been previously argued, January the 9th would be
12 the 60th day. And that would be what the court
13 should rule, that that obligation should be extended
14 only to the end of that period.

15 THE COURT: All right. Thank you.

16 SPEAKER 3: Good afternoon, Your Honor.

17 Clinia Miller on behalf of two landlords, first
18 industrial realty trust Inc. and general Orlando
19 authority. My clients, Your Honor, were among the
20 groups of objecting landlords in the prior hearing
21 before the court here on December the fifth. I just
22 wanted to main continue the request of my clients
23 that the court ordered the debtors to immediately
24 pay any amounts due to them for the stub period.
25 And wanted the record to reflect that my clients

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1 continue to pre serve their right to an
2 administrative claim for the amounts that are due
3 for the stub period. And we have an agreement with
4 the debtors that to the extent the court orders
5 payment of such rent and finalizes the timing of

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6 such payment, we'll work with them to reconcile the
7 amounts that are due and owing. And if we cannot
8 reach an agreement, we'll schedule an evidentiary
9 hearing at a later date.

10 THE COURT: All right. Thank you.

11 SPEAKER 3: Good afternoon, Your Honor. My
12 name is Pete perill. I'm here on behalf of prat
13 center LLC and valley corner shopping center, LLC.

14 Your Honor, first of all, I'd like to join in
15 the argument that is have been made thus far on
16 behalf of my clients and then point out some
17 language this which is also in the track auto case
18 which I think is instructive. Quoteing from the
19 development of New York case, the judge states that
20 section 365 T 3 advances the landlord to the head of
21 the line for the current payment of on going expense
22 in recognition of his unique and voluntary creditor
23 status. It then goes onto talk about whether this
24 should be treated as a super priority or not. In
25 that particular instance the court said No. I think

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1 case is clearly distinguished from that case in
2 that, that case was filed on July 5th of 01, I
3 believe. I'm not sure when the motions were
4 actually filed, but the decision was rendered in
5 March of 02. I'm going to assume that some time had
6 passed between fileing the motion by the landlord
7 and the rendering of the decision. And the pudgy
8 case states that one of the reasons behind the

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9 holding is to encourage lessors to be proactive in
10 asserting their rights. And I think clearly that is
11 the case here, Your Honor. The landlords have been
12 proactive. As a result, we believe 365 D 3
13 dictates that they should be moved to the head of
14 the line and paid for the stub rent.

15 The argument raised by the debtor regarding
16 defaults under the DIP facility I'm not sure works
17 here. The debtor made the decision, obviously, in
18 coming up with this budget not to pay stub rent. It
19 they could have just as easily submitted a budget
20 that contemplated stub rent and had that as part of
21 their tip agreement, presumably. We don't believe
22 the landlord should be penalized for not including
23 that in their initial budget.

24 THE COURT: Thank you.

25 SPEAKER 3: Thank you, sir.

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1 SPEAKER 3: Good afternoon, Your Honor.
2 David caulks on behalf of the landlord port Arthur
3 holdings three limited. Much of my argument has now
4 been made perhaps more persuasively than I would
5 have by others on behalf of the landlords.

6 I did want to emphasize the liquidity issue
7 again. It seems to me that to the extent that the
8 debtor made an assumption that they would not have
9 to pay currently for the right to stay on the
10 premises while they earned revenue from that, that
11 is a self-inflicted problem that should not now be
12 used as argument that should advance the cause that

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13 they shouldn't honor the obligations that legally
14 they have under section 365 D 3.

15 I should also note that to the extent that we
16 hope the court will not rule that they are an
17 administrative expense, but to the extent to court
18 does so, I believe the deadline may have been Friday
19 to file an administrative claim. So certainly we
20 need to make sure -- to the extent -- because I know
21 we did not treat our sub rent as an administrative
22 claim, and we don't believe it is. But to the
23 extent that the court should rule otherwise, we'd
24 want to make sure that the landlords are provided
25 ample opportunity to file their claims timely.

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1 Thank you, Your Honor.

2 SPEAKER 3: Good afternoon, Your Honor. Neil
3 McCullough. I'm here on behalf of two of the
4 landlords, Panattoni Northglenn and Panattoni
5 Denton. They're items number 15 and 17 on the
6 agenda for this afternoon. I address the Court only
7 to state my clients agree with the arguments made by
8 counsel so far, and to join in that agreement.

9 THE COURT: All right. Thank you.

10 SPEAKER 3: Good afternoon, Your Honor.
11 Robert Lee from Kelly. I represent developers
12 diversified, general growth, wine garden realty,
13 basile, Phillips, regency centers -- six or seven
14 other landlords, Your Honor, with a total of 79
15 locations that are going forward.

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16 Certainly agree with all the comments that
17 Mr. Pollock put on the record. I would just like to
18 add that we believe the accrual method is entirely
19 consistent with Congressional intent. It's current
20 payment for post petition services. It's consistent
21 with the relevant case law, track auto, best
22 products. And it's consistent with the over all
23 purposes of the the code. With respect to the
24 timing question that you've asked for several folks
25 what does 365 D 3 mean with respect to timely
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1 performance. I think what you could find with
2 almost all these leases is if the rent doesn't
3 commence on the first day of the month, then it
4 shall be due and payable on the first day of the
5 following month. And to the extent that you impose
6 this legal fiction that we've been discussing on the
7 bankruptcy code, you have the pre petition portion
8 and then you have post petition rent due. To the
9 extent it's not due on the first day of the month,
10 it should be due timely on the first day of the the
11 next month. But to the extent that the argument --
12 you know, that the statute provides for the latest
13 day of the timing here would be January 9th, we ask
14 at the latest that the court order that the debtor
15 pay the stub rent on January 9th. We also did file
16 the joinder, Your Honor. And we attached that -- a
17 copy of the memorandum of opinion that judge Gropper
18 just issued in the southern district of New York on
19 stone barn.

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20 THE COURT: All right. Thank you.

21 SPEAKER 3: Good afternoon, Your Honor. Mary
22 house on behalf of Burr, Street, C I M Birch Street.
23 We join in the arguments that have been made this
24 morning.

25 THE COURT: Thank you.

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1 SPEAKER 3: Nicholas Forehand, Your Honor. I
2 have thought I was going to be last, but someones
3 else came in behind me.

4 THE COURT: You can go back.

5 SPEAKER 3: I too represent a number of
6 landlords who were objecting landlords to preserve
7 their rights at that time December fifth hearing for
8 this specific hearing today due to a number of other
9 factors it appears that the number of leases that
10 I've got at this point are down to about six or
11 seven that are affected by this issue, Westfield,
12 Cardinal Capital has a couple. Capital maybe a
13 couple also. Your Honor, I adopt and fully support
14 the well-raised arguments of both Mr. Lehan and
15 Mr. Pollock and the others that have come up here
16 today. This is an issue that has gone and come back
17 in a lot of ways. This issue started as the courts
18 were generally uniform in believing this was the pro
19 rata approach was correct. There was a swing toward
20 the billing date method and now I believe the courts
21 are swinging back conclusively toward the accrual or
22 pro rata method. And I think that the court ought

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23 to -- ought to go with the -- substantially with the
24 track auto case. Thank you very much, Your Honor.

25 THE COURT: Thank you, sir.

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1 SPEAKER 3: Good afternoon, Your Honor,
2 again. Daniel Kerrihan, Long and Aldridge, with
3 Orchard Park Leaseholders. It's number 25 on this
4 afternoon's agenda.

5 Our client is in the prime lease with a
6 lease to the debtor, and then leases between the
7 debtor and subtenants both, whatever -- at this
8 stage.

9 Your Honor, the debtor's argument in its
10 omnibus objection and omnibus response to these
11 various motions that are sort of put together for
12 purposes of the hearing really rely on two cases:
13 K-Mart, and they rely on the case that K-Mart relied
14 on, Chambliss out of Delaware. There are two pieces
15 to these cases that we respectfully suggest that the
16 Court can consider.

17 One is with respect to K-Mart. This was a
18 situation where the debtor had not been paid under
19 the sublease; and, in fact, the prime landlord in
20 that case or overlord, as the debtor characterizes
21 it, had been paid by the sublessee. These were not
22 situations where the debtor had been paid and then
23 had retained the payments and yet had not paid the
24 amounts due under the prime lease. And, in fact, in
25 the K-Mart case, and as noted in one of the

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1 pleadings to which we joined. And I might say at
2 this point before I forget it, I join in everything
3 the landlord body has said here today?

4 A. I was confident of that.

5 SPEAKER 3: Somehow I thought you were, Your
6 Honor. Your Honor, may I approach with copies of
7 orders from the K-Mart case. And these are
8 referenced in --

9 THE COURT: Give it to the security officer.

10 SPEAKER 3: Thank you, Your Honor. I have
11 copies for counsel.

12 Someone was helpful enough to mark these up
13 for me to -- before I got a hold of them -- to
14 illustrate. They are cited in the golf galaxy
15 response to the motion to reject that was filed at
16 one to have first day motions. If the court would
17 turn to the second -- the one that does not have the
18 reference to shy low war cliff super value -- either
19 the second or the first, depending on which you
20 have. There is a provision on page 2, paragraph 3,
21 which says that the rights of any subtenant of the
22 premises subject of any real property lease under
23 365 H of the code are preserved with respect to the
24 debtors only. Provided, however, with respect to
25 any real property lease subject to a sublease, the
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1 debtor, subject to and after reconciling the sub

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2 tenant's accounting against any outstanding amounts
3 owed to the debtors under the applicable sublease
4 and applying any such rentals received against any
5 such outstanding amounts shall turn over to the
6 applicable landlord any and all rentals collected by
7 the debtors from the subtenant of premises subject
8 to such real property lease for rental periods
9 arising from and after the effective date of the
10 rejection.

11 If you tie that to the prorata -- the
12 prorated view that we're using in this case per
13 agreement with the debtor, what that would suggest
14 is that anything that the debtor has collected with
15 respect to a post rejection, post petition period --
16 and remember, the debtor seeks to reject effective
17 as of November 10 or 11 or 12, whatever the date
18 is -- that those monies should be paid over to the
19 prime landlord.

20 So what K-Mart, which is one of the prime
21 cases they rely upon in this situation, is factually
22 different at least in the sense that there was, in
23 the particular lease that was considered in the
24 cited case, the post rejection payments, sublease
25 payments had been made to the prime landlord; and in

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1 this case essentially the rejections of these
2 subleases and prime lease were conditioned upon the
3 pay over of monies that the debtor had actually
4 received. It's not clear from this, and there is
5 some -- it's somewhat equivocal as to what exactly

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6 they're talking about here. But it does say and it
7 does recognize the principal that if you're going to
8 take the advantage of having the rights as a lessee
9 and as a sub less or, and you take the benefits from
10 the sublease, that you should have to disgorge those
11 benefits as a condition of getting your earlier
12 rejection date.

13 THE COURT: Do you know whether or not the
14 order you referenced the court, whether there was
15 something that was contested and this was a decision
16 of the court or whether there this was an agreement
17 of the parties that commemorate and the court was
18 commemorating the agreement of the parties or how
19 this all came before the court?

20 SPEAKER 3: I do not, Your Honor, only what's
21 recited in the order itself.

22 THE COURT: All right. Thank you.

23 SPEAKER 3: The two separate orders where it
24 was recited.

25 In addition, Your Honor, because K-Mart
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1 relied so much upon Shea less F you look very near
2 the end to have district court's decision in Shea
3 less, it's basically the last two paragraphs. I'm
4 sorry I have a version that has pages 1 through 5
5 and that's not the B R. It's 147 B R 96. It's near
6 the end of the case at page -- it looks like it's at
7 page 101. What it describes is that, in fact,
8 during the hearing on the -- for the district court

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9 on this particular matter, what came up was that the
10 debtor had been paid post petition and post
11 rejection by the sub for periods of time post
12 petition. And what the decision says at the end, it
13 says, it further appears -- and Chambliss apparently
14 concedes this point -- that Chambliss is liable to
15 Kaplan for approximately 60 days administrative rent
16 from the period April 8, 1991 to June 7, 1991.
17 Additionally, Chambliss must pay to Kaplan any funds
18 paid to Chatliss by PS as rental payments, including
19 including approximately \$81,000 of said funds to
20 which the parties referred during oral argument
21 before this court on May 29, 1992. Again, Chatliss
22 is recognizing the principle that if you want an
23 earlier rejection date on both the prime lease and
24 on the sublease, you must disgorge that which is
25 attributable to the post rejection period.

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1 Now, in this case, again, since it was
2 November ten is the date that they're looking for as
3 the rejection date, then the amount attributable
4 that they've been paid to the remainder of the month
5 ought to be paid over to the prime landlord. And
6 that, Your Honor, is not so far from what the debtor
7 has done in those situations where there has been a
8 G O B sale on going in a lease premises where
9 they're selling the -- where they're selling the
10 inventory and what have you that's on site. What
11 they've done in reliance upon their pre petition
12 agreement with the G O B sales agent or liquidate or

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13 or what have you, is that there's a provision that
14 the debtor is reimbursed for the expenses of the G O
15 B sale; and those reimburses include rental
16 payments, sort of stub rentals, if you will, from
17 the time of the filing until the time they complete
18 the G O B sale. Now, what's the different
19 represents, really, economically whether you get
20 paid in arrears or you get paid in advance. The
21 debtors acknowledge it would be unfair, it would be
22 unequitable, it would be inappropriate to take the
23 money and then on these G O B sales situations and
24 not pass it through to the landlords. Why then is
25 it inequitable, unfair or otherwise for them to have

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1 been paid in advance and not pass it through to the
2 post petition period between the date they want as
3 the rejection date and the end of the month? And
4 that basically, Your Honor -- I mean T debtor cites
5 a lot of cases and engages in a lot of discussion in
6 their briefs about how to do so, they're not allowed
7 to make those payments. They're not allowed to make
8 those reimbursements because of the bankruptcy code.
9 Well, at least two courts have recognize that had
10 they are allowed. They're allowed because it's
11 within the court's discretion to condition their
12 rejection upon making those payments. And that's
13 what we asked for here. The debtor has in its
14 opening briefs on its first day in its first day
15 declarations, they have essentially provided to the

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16 court and to the creditor body a whole lot of
17 reasons to disregard the priority scheme set up in
18 the code and the distribution scheme set up in the
19 code. And it's based on things like the doctrine of
20 necessity. It's based on things like business
21 judgment. It's based on things like, if we don't do
22 this, the reorganization of the debtor is going to
23 be hampered and the ultimate detriment of all the
24 creditors and stakeholders in the case.

25 Your Honor -- and those arguments -- the
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1 Court has accepted those arguments and so ruled, and
2 frankly, they make a lot of sense in those cases.
3 But it does upset the statutory scheme. What the
4 K-Mart cases did and what Chambliss did was to take
5 the statutory scheme and to find a way to reconcile
6 it with the facts and with the payments that have
7 been made. And what they essentially did was to say
8 you can get your rejection date, but you can't keep
9 the money that you were paid already for post
10 petition periods.

11 And that's all we're asking to be done here,
12 Your Honor, in the case of the overlord sublessor,
13 sublessee situation. Thank you, Your Honor.

14 THE COURT: Thank you.

15 SPEAKER 3: Your Honor, if I may thank you on
16 behalf of our clients and our firm and my colleague
17 I believe who is on the phone for allowing us to
18 appear pro hoc vice, and may we wish the court and
19 its staff a happy holiday.

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20 THE COURT: Thank you, sir.
21 SPEAKER 3: Thank you, Your Honor.
22 SPEAKER 3: Good afternoon, Your Honor. I'm
23 Janet myberger. I'm appearing on behalf of Rick
24 Mack, R I C M A C, equities corporation.
25 Your Honor, I filed an objection to the
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1 debtor's motion to extend the time to assume or
2 reject my client's lease, docket number 597. It was
3 on the agenda for the December 5 omnibus hearing,
4 which I attended. I did not note my appearance for
5 the record. I did want to do that today, though,
6 Your Honor, because my client's objection, which was
7 primarily based on the debtor's failure to comply
8 with section 365 D 3 and failure to timely perform
9 their post petition obligations under my client's
10 lease. My client's objection was resolved. And it
11 was stated on the record it was resolved, as were
12 the objections of the other landlords, except with
13 respect to the stub rent. And that issue was
14 carried forward to today. It's not on the agenda
15 technically, but I did want to make clear that it
16 was agreed and stated on the record on December 5
17 that the landlords who objected to the motion to
18 extend, their objections would be treated as motions
19 to compel payment of the stub rent and taken up
20 today, along with those other motions.
21 So I'm noting my appearance for the record.
22 And obviously, Your Honor, I agree with the other

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comments of the other landlords' attorneys.

24 THE COURT: Thank you very much.

25 SPEAKER 3: Good afternoon, Your Honor. My
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1 name is Daniel. I'm here on behalf of several
2 landlords, including amcap north point and am cap
3 overland. I'd just like to join on the record the
4 arguments of both Mr. Lee han and Mr. Pollock. I
5 thought I was the last, but I guess not.

6 SPEAKER 3: Good afternoon, Your Honor,
7 sheila del cruise again. I am counsel also for
8 altamonte springs real estate development. Very
9 similar to what prior counsel has said regarding
10 filing an objection to a debtor's motion to extend
11 the time to assume or reject leases, altamonte also
12 filed an objection which pursuant to the December
13 fifth hearing, Mr. Galardi did represent that
14 whether you filed a motion to compel, as many here
15 have already done, or an objection as my clients,
16 all would be treated as a motion to compel. So on
17 behalf of altimont springs, whose separate issue was
18 the only thing left to resolve in their rejection in
19 the December fifth hearing, we'd also like to join
20 in with the other landlords and request stub payment
21 at this time, Your Honor.

22 THE COURT: All right. Thank you very much.
23 Mr. Galardi? So I guess for the Court's
24 understanding, because we're taking up a lot of
25 these matters together on the agenda --

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1 MR. GALARDI: And I think we'll go through
2 the agenda one by one after that, because I think we
3 have to do that. One issue that seemed common to
4 all of them --

5 THE COURT: Is the stub rent.

6 MR. GALARDI: So the first thing with respect
7 to the two counsel that got up that did not get
8 listed on the agenda, but did raise this in the 365
9 D 4 objection, I affirm I didn't require a motion to
10 go and make this argument. I thought we had plenty
11 of those.

12 Your Honor, you've heard a lot about the
13 southern district of New York. You've heard a lot
14 about the third circuit. And you've heard a lot of
15 track auto. But everybody seems to want to forget
16 one part of track auto. That's where the court
17 specifically said finding the pudgy out of the
18 bankruptcy court southern district of New York, we
19 find this reasoning persuasive, and agree that the
20 remedy for untimely performance of the 365 D 3 is
21 not super priority.

22 So even if everything they say is correct,
23 and even if 365 D 3 is the statute that we are going
24 under, they're asking for super priority claim. And
25 this circuit or this jurisdiction -- as opposed to

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1 Delaware, as opposed to New York, as opposed to the

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2 sixth circuit, as opposed to K-Mart, as opposed to
3 every other jurisdiction -- has a different
4 standard. That's part of the problem. That's why
5 landlords show up at every jurisdiction, because
6 they want one standard. Frankly, from a debtor's
7 perspective, we do, too. But we're living with the
8 auto track. And auto track says it's not
9 necessarily a super priority claim.

10 Getting back to, I think, what Your Honor
11 asked is the simplest question here: What is timely
12 performance? 365 says timely performance. Well,
13 the child world case that started this says what the
14 lease says. Well, what the lease says was this rent
15 was due November first. So, therefore, this timely
16 obligation is not a timely obligation that can be
17 paid whatsoever. So we're not going under the
18 lease. So we're now creating a legal fiction. What
19 courts have done with the accrual method is created
20 a legal fiction. And the legal fiction basically
21 says what? It says, well, there's this period of
22 time after you fail to timely perform that there is
23 a day-to-day essential benefit to the estate, but we
24 don't have to worry about 503 B because we're going
25 to do accrual. All we've said is with respect to

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1 that period of time, nothing under any lease under
2 any contract is an obligation that has to be
3 performed except for the legal fiction. So this
4 court has the authority to decide when do you pay
5 that amount? What auto track says is it's not

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6 entitled to super priority. That to me says it's an
7 administrative claim. So Your Honor has -- and they
8 even go through and use the 507 A analysis. They
9 say it doesn't have to satisfy the benefit to the
10 estate under 503 B, but it is still an
11 administrative claim. It is still a 503 D 1
12 expense. You just don't have to show benefit to the
13 estate because either it's so obvious or need not be
14 said that if you're in a premises occupying those
15 premises, it's an actual and necessary cost of doing
16 business. The accrual method works. So given 507 A
17 priority -- and that means paying 1129A9. You can
18 pay at that point.

19 So I think the first aspect is
20 notwithstanding what judge groper says in New York,
21 and notwithstanding what the 6th circuit says, and
22 notwithstanding what the third circuit says, this
23 court has already said it does not have to be
24 treated as a super priority claim, whether it's 365
25 D 3 or not

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1 Now, Your Honor -- and I appreciate
2 Mr. Pollock giving me to January 9th. I actually
3 think that's an incorrect reading. So although we
4 agree about many things, I actually don't think --
5 I'll gladly say that at the earliest I would pay it
6 January 9th. But I don't think that's what 365 D 3
7 says. It says the court may extend for cause the
8 time for performance of any obligation that arises

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9 within the 60 days after the order for relief.
10 Again, our view is this obligation did not arise
11 under any contract in that 60 day period. It arose
12 on November first. So I don't get only to January
13 9th. I get what 507 A says I get. I get to the
14 confirmation of a plan. Whether it's 365 D 3 -- so
15 I put two things together. I put the auto track
16 together and it says even if it's 365 D 3 it says --
17 and everybody up here wanted to get auto track, auto
18 track, auto track. Now they don't want it because
19 it's not a super priority claim. I don't have to
20 pay it right now. 365 D 3, it's not a time -- an
21 obligation that arose after the 60 days. It's a
22 legal fiction. It's not an obligation. The court
23 has basically said we agree it's 365 D 3, but it
24 doesn't go to establish the priority. It follows
25 the pudgy's development case and says it doesn't

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1 tell you when the priority is. It doesn't tell you
2 the established priority. It does tell you that
3 it's not a super priority.

4 And so I come back to Your Honor has the
5 discretion under the circumstances to decide when
6 this payment has to be made.

7 Now, what we have done -- many people will
8 say, well, we should put on evidence that we might
9 be administratively insolvent. Well, that would
10 seem to me counterintuitive because if we're
11 administratively insolvent, I'd be far more
12 sympathetic to the landlords paying now because you

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13 don't want them to take the risk. The whole point
14 of the track auto case was to say, come in. Don't
15 sit back on your rights. Assert your claim. Get it
16 asserted. We have agreed that we would not have it
17 subject to disgorgement. That was the business
18 conversation on 365 D 36789 we'll agree you have an
19 administrative claim. We'll agree it's not subject
20 to disgorgement. What we haven't agreed to -- and
21 what I don't think track auto says, I don't think
22 365 D 3 says, and I don't think any opinion says --
23 even Judge gropper's opinion didn't say you have to
24 pay it now. You have to pay it on today. And
25 timely obligation here doesn't make sense when the
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1 timely obligation was pre petition. The landlords
2 put it back to pre petition. It was ten days. They
3 didn't act pre petition. Timely performance under
4 the lease cannot happen now. And Your Honor has the
5 -- both precedent, plus discretion, plus no statute
6 that precludes that allows you determine the timing
7 of the payment. And all we've asked is the timing
8 of the payment is not now. The timing of the
9 payment may be January 9th. It may be January 16th.
10 It may be the effective date of the plan. But it is
11 nothing required by statute that says it's today.
12 And we are asking you to not order it today, to deny
13 the motion without prejudice to come back with
14 change circumstances -- and again, I don't need the
15 landlords on a weekly basis -- but we think at least

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16 at this point since it's not super priority, they
17 have the protection that they're not going to be
18 subject to disgorgement that they have to share with
19 others, that we would ask the court to say it's a 07
20 A administrative claim 365 D 3 does not require that
21 we timely pay it right now. We agree to the accrual
22 method which created a legal fiction. We don't
23 concede that we've conceded that had the accrual
24 method says it's a timely obligation. To agree with
25 the accrual method is to say we understand it's a
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1 post petition expense. It's not to say that there
2 is an obligation to be bound to pay it and to timely
3 perform it. We agree it's an obligation. We agree
4 it's an administrative expense. If we had pushed
5 the billing date approach, we would have pushed
6 it -- this isn't even an administrative claim. It
7 would have been a pre petition claim the sixth
8 circuit said. So we're agreeing to compromise and
9 say it's an administrative claim, but we don't think
10 365 D 3 requires payment. And we think simply the
11 track auto case says it's not entitled to super
12 priority, which is to pay it in advance of other
13 administrative claims, or in advance of the secured
14 lenders. And we would ask Your Honor to deny the
15 request for stub rent without prejudice if there's a
16 change in circumstance. But to say that it's a 507
17 A claim, just as it says in track auto, and that it
18 can be paid in accordance with when 507 A claims are
19 paid, which is the effective date of the plan unless

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20 the court orders otherwise. That's our response,
21 Your Honor.

22 THE COURT: All right. Thank you.

23 Mr. Pollock, you don't agree with that?

24 SPEAKER 3: No, Your Honor. Since this is
25 really a landlord motion, might I just reply to two

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1 points that were made subsequent to our initial
2 argument.

3 THE COURT: I'll let you.

4 SPEAKER 3: Thank you, Your Honor. First,
5 just to clarify one thing that was said, somebody
6 raised an issue about a Friday bar date for
7 administrative claims. That was a 507 B 9 claim.

8 MR. GALARDI: It's a 07 -- it wasn't an
9 administrative claim.

10 THE COURT: I was aware of that.

11 SPEAKER 3: I didn't want everybody to be
12 rushing in and filing administrative claims.

13 Your Honor, the two points that were raised
14 was this sort of super priority and legal fiction
15 issue. I don't think it's either there is no legal
16 fiction. Legal fiction is that the rent is only due
17 on the first of the month. That presumes that if
18 the debtor doesn't pay or any tenant doesn't pay,
19 the rent goes away. He doesn't have to pay on the
20 second of the month and say I didn't pay you on the
21 first. I don't have to pay till the next month.

22 THE COURT: There's no question the rant rent

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23 is going away everybody acknowledges the rent is due
24 for the stub rent. The question is: What does
25 timely perform mean? And that was the question I

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1 think people were trying to answer. And Mr. Galardi
2 suggested that the obligation to perform occurred on
3 the first of the month, if that's what the rent --
4 the lease says, or if it has some other date,
5 whatever that date is. And that's what timely
6 perform means. And then if that date has come and
7 gone, then it's up to the court to try to figure
8 out, okay, when does the debtor -- when is the
9 debtor required to perform.

10 SPEAKER 3: And that's what I'm suggesting to
11 Your Honor is incorrect, that the rent may be due on
12 the first, but the rent continues to be due
13 throughout the period, throughout the month. The
14 rent does not just -- is not just due on the first.
15 The rent is due until it is paid. And the proration
16 method separates the pre petition versus the post
17 petition. And in essence, most of the leases say
18 the lease doesn't begin on the first of the month,
19 and you pay from that day till the end of the month.
20 And that's what we have. The rent doesn't go away.
21 The fiction is that the rent was only due, and is
22 there for a prepetition obligation. What I'm saying
23 to you --

24 THE COURT: That's not what we're saying at
25 all. We're saying it's a post petition obligation

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1 for the stub rent.

2 SPEAKER 3: Correct.

3 THE COURT: And that it is payable to the
4 landlords. It's at least entitled to a 507
5 administrative claim. Now, the question is when
6 does it have to be paid. And that's the thing I'm
7 struggling with, because if the obligation occurred
8 on the 1s first of the month to pay it, when is the
9 time fixed and what does timely perform obligations
10 arise after commencement of the case? What does
11 that mean?

12 SPEAKER 3: And that's what I'm suggesting to
13 Your Honor, is that under virtually every lease,
14 that obligation is a continuing obligation. The
15 timeliness of it doesn't go away on that first of
16 the month. The timeliness goes -- begins or accrues
17 essentially each day. And on the first day of the
18 filing there is a timely obligation -- there's still
19 an obligation to timely pay. The outside of that
20 timely obligation. And I read that section quite
21 differently than Mr. Galardi suggests -- the outside
22 obligation is 60 days. The court I say cannot go
23 beyond that period. That goes back to the original
24 Congressional intent when the 1984 amendments were
25 passed where the the off cited comments of senator
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1 hatch is that the landlord is to be paid and not

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2 have to wait for the payment of the rent. Things
3 are to be done on a timely basis. That's what this
4 was all about in the first instance. Could we have
5 written it more clearly? Absolutely. Would we like
6 to see it changed so it is clear and we don't have
7 these fights going forward? Absolutely. But as
8 others have said, this is what we have to deal with
9 today, and that's the basis that Your Honor has to
10 reach an ultimate decision.

11 THE COURT: Of course, this is probably the
12 most amended section of the entire bankruptcy code.

13 SPEAKER 3: We've tried to amend it even
14 more, Your Honor, but have not been successful.
15 Those are really the only two points, Your Honor,
16 the 60 day, my disagreement with 60 days that, being
17 the outside date for timeliness and the other
18 argument with regard to --

19 THE COURT: All right. Thank you, sir.

20 SPEAKER 3: Thank you, Your Honor.

21 SPEAKER 3: If I may, Your Honor, Michael
22 cadelle is on behalf of Cole partners. There are
23 the distinction that our clients have in this
24 instance, and that is that our rent came due at the
25 end of the month instead of the beginning of the

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1 month. So on November 31st is when our rent was
2 due. So all the arguments Mr. Galardi is making
3 that there is this legal fiction does not apply in
4 our instance; and that, instead, we are post
5 petition obligation. And that's why we feel it's

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6 important that the debtor first having taken the
7 position that the billing method applies would make
8 the rent for the entire month due. But at a
9 minimum, if the court adopts the accrual method,
10 then we would at least be obligated to receive the
11 rent for the period from November 10th to the end of
12 the month.

13 THE COURT: So your lease provided that on
14 December 1, the November rent was due?

15 SPEAKER 3: No. On November 31st, the
16 November rent was due.

17 THE COURT: Okay.

18 SPEAKER 3: Thank you, Your Honor. Pete Carl
19 again. Just a couple of follow-up points. In Judge
20 Gropper's decision, Your Honor, in talking about --
21 I realize the Court is wrestling with the point of
22 timeliness. It's in re Stone Bar Manhattan LLC,
23 formerly known as Steven Barry.

24 Judge Gropper says that the Court remains
25 convinced that the proper construction of 365 D 3 is

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1 to hold the debtors responsible for the stub rent
2 measured on a daily basis as it accrued after the
3 date of the orders for relief and until the end of
4 that month. So I would concur in the argument
5 that --

6 THE COURT: So we're saying the
7 response -- there's no question about that. When
8 are you required to make payment for which you're

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9 responsi ble.

10 SPEAKER 3: Then I go back to the language of
11 track auto that I cited before which quoted that
12 portion of the pudgy's case that does indicate that
13 landlords are brought to the top of the line. I
14 believe it says advance the landlord to the head of
15 the line for current payment of on going expenses.
16 And then it seems to condition that on the landlord
17 being proactive in exercising his rights. And
18 again, I believe that is absolutely the case here.
19 These landlords have come in on a proactive basis to
20 exercise their rights and as a result should have
21 what in effect is a super priority type claim.

22 THE COURT: But judge Adams in the track auto
23 case, he said it wasn't entitled to a super
24 priority.

25 SPEAKER 3: Understood. But I think he
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1 needed to look at the time frame there. As I read
2 this case, that case was filed again in July of 01.
3 I don't think it references here when motions were
4 filed. But the decision wasn't until March of 02.
5 He says the statute does not allow the landlord
6 should permit his right to lapse into a claim for
7 accrued amounts and later attempt to assert the
8 claim on a super priority basis. So I think a
9 distinguishing characteristic here is that there was
10 no delay. There was no waiting. And the landlords
11 came in right away to assert their claims.

12 THE COURT: Okay. Thank you.
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13 SPEAKER 3: Thank you, sir.

14 MR. GALARDI: Your Honor, I didn't address
15 two points. Again, we would rest on the track auto
16 as far as that goes. The court is pretty clear as
17 to what the debate was. It says what the debate was
18 on the payment. Then it says, Your Honor, it won
19 unfair in similarly situated creditors to grant
20 anything more. So it didn't grant a super priority
21 claim.

22 The one topic I didn't address was the
23 attorney's fees issue. Just briefly, Your Honor,
24 none of the landlords -- they all put through their
25 leases and fortunately or unfortunately I've been
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1 through this argument as well. The leases are never
2 as clear as the landlords say they are. And it's
3 not always clear that they're enforcing breaches of
4 the leases or the bankruptcy code. So we would like
5 to reserve rights on all of those. We think -- but
6 nothing here would prejudice their claims. Indeed,
7 Your Honor, even the the counsel who was up here
8 said the fees had to be reasonable. We have taken
9 the position at least in other cases -- and wouldn't
10 be surprised in we take it here -- that post
11 petition attorney's fees need not be paid. But even
12 if they are paid, they are restricted to the
13 specific term of the lease. An invoice would have
14 to be sent. We would reserve our rights to see the
15 invoice and object to that, Your Honor.

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16 Again, Your Honor, what the landlords
17 basically want to say is each and every day post
18 petition is a new lease and new transaction, whether
19 it's daily, weekly, by the second. They want us to
20 pay as we go each and every day. We don't see that
21 in our leases. And Mr. Poll you can and Mr. Lehan
22 get up and say all these leases probably do that.
23 There's many contracts that are pre petition
24 contract that is carry that over and you don't have
25 to pay it F. the first -- the way in which the
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1 courts have looked at this is what's the day that
2 the obligation first arose? The obligation first
3 arose on November first. No one has objected to
4 that. So even though we have the fiction, the
5 metaphysical fiction of cutting each day to a day
6 you're getting benefits, Your Honor, again, track
7 auto just simply says that's fine, but we don't have
8 to pay that as a sup priority claim. So we'd ask
9 Your Honor to deny the motion.

10 THE COURT: Mr. Galardi, would you comment on
11 Mr. Cadella's lease.

12 MR. GALARDI: Sure.

13 THE COURT: He has one which the obligation
14 arose on November 31 for the stub rent that would be
15 paid in November.

16 MR. FOLEY: Your Honor, again, there were
17 other ones we settled last time. What we we agreed
18 to do was if the obligation was November 30th for
19 the entire month of November, what we've agreed to

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20 is to pay under the accrual method T 20 days. What
21 Mr. ca kneel is arguing is, well, I don't really
22 like the accrual method on this particular point. I
23 like the billing date approach so I can get the full
24 November approach. Your Honor, what we've said in
25 this case is we'll be governed by Your Honor asking
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1 me whether I'm going to step away from the billing
2 date approach, given the track auto and given how
3 everything has developed and given that I think
4 close to 80 percent of the landlords are here,
5 anyway, we decided to stay away from the billing
6 date approach. With respect to that, his argument
7 if if the accrual method is going to govern this
8 case, our view is the same. If it's due on November
9 30th, we pay the post petition portion from November
10 10th to November 30th. I think that gentleman wants
11 all the way back to November 10th. We would say the
12 accrual method if you're going to only do post
13 petition benefit or occupancy, then at least for
14 this period of time we would make that payment only,
15 the 20 day payment. Thank you.

16 THE COURT: All right. Thank you.

17 The court has looked at this matter. The
18 statute could be a lot clearer than it is. The
19 court is going to follow the track auto and judge
20 Tyson's prior decision. It's been established in
21 this district and not order the debtor to pay the
22 stub rent at this time on the basis that it's not

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23 entitle today super priority. It is entitled to
24 priority in the administrative claim under section
25 507 A. The only question is when the timing of the
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1 payment should be made. And the timing of that
2 payment would be, as Mr. Galardi says, of the
3 effective date of the plan. But that's without
4 prejudice to any landlord being able to come back
5 for cause and requesting an earlier payment, as
6 developments in the case may dictate.

7 With regard to the payment of attorney's
8 fees, the court is not going to require the payment
9 of attorney's fees at that time -- at this time; and
10 again, reserving the right of the debtor to object
11 to the claims that come due and claims that are
12 made, and will take them up on an individual basis,
13 depending on the contract language set forth in the
14 lease.

15 With regard to leases that provide for
16 obligations to pay rent arising after the
17 commencement of the case, the debtor will be
18 responsible for paying the stub rent, but only the
19 20 day portion of the rent for November. And that
20 obligation became due on November 31 or whatever day
21 it was set forth in the lease. So that rent would
22 have to be paid.

23 Are there any other issues that I failed to
24 mention, Mr. Galardi?

25 MR. GALARDI: I think on the broad issues I

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1 think if we run through the agenda things may come
2 up now. I think that's the best way to approach it.

3 THE COURT: We can discuss then how we're
4 going to -- with regard to that finding, as well.
5 Let's go through the agenda at this point.

6 MR. GALARDI: The matter that started this
7 all was the matter of burr bank mall. I think that
8 addresses all of the burr bank mall issues.

9 THE COURT: That's item number 8.

10 SPEAKER 3: This is Paul Biley. I think
11 that's correct.

12 MR. GALARDI: Your Honor, I guess this is as
13 good a time as any to discuss how to do orders on
14 these matters. Should we just submit individual
15 orders that deny it on the grounds set forth in the
16 record with respect to this particular one and then
17 we can deal with that? Is that acceptable to you.

18 SPEAKER 3: That's fine with me.

19 THE COURT: Okay. That's fine with the
20 court.

21 MR. GALARDI: Thank you, Your Honor.

22 Your Honor, the next matter is matter 9 which
23 is the matter of crown C C I. Again, I think it was
24 the same sort of motion to compel. I don't know if
25 we've addressed all of the issues.

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1 SPEAKER 3: Paul Biley for C C.

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2 SPEAKER 3: That's correct, it's been
3 addressed.

4 THE COURT: Okay.

5 MR. GALARDI: The next motion on the agenda
6 is item number ten. It's the the motion of wood law
7 and associations, again a motion to compel. I'm not
8 sure. I think it was only a stub rental.

9 SPEAKER 3: Sheila del cruise. Yes, it with
10 was a stub rent issue. Could Your Honor clarify, do
11 we need to submit individual order force the
12 motions?

13 MR. GALARDI: It's fine by me to give you a
14 form of order denying the motions for the reasons
15 set forth in the record if that's the easiest thing
16 for you.

17 SPEAKER 3: That's fine.

18 THE COURT: Thank you.

19 MR. GALARDI: Your Honor, the next one is
20 item 11, which is the motion by 502-1286. I believe
21 that this is the only out standing issue on this was
22 the stub rent because I believe we paid the December
23 rent which got caught up. I don't know if counsel
24 is here.

25 SPEAKER 3: That's true for 11 and 12 coming
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1 up.

2 MR. GALARDI: And that obviously takes care
3 of matter 12 as well, the motion of concealed
4 limited liability company.

5 Your Honor, the next matter on the agenda was
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6 item number 13 which was the motion by the debtors
7 to establish bidding procedures. We had resolved
8 all of the matters, because there were a number of
9 objections to secure amounts, which obviously since
10 we -- let me give some background, Your Honor. We
11 had basically a process where we were going to
12 auction those leases, I think it was roughly 100 or
13 so -- 155 of the ones that were store closings.
14 Unfortunately, given the retail environment I
15 believe in general and many big boxes being on the
16 market, we got only one bid by one party for the
17 lease. So we canceled the auction with respect to
18 that. The one objection that we have is the
19 objection of reoh associates which is item B on page
20 16. My understanding is that that is now resolved
21 with reoh. So there would be no other objections.
22 I think there's no order that Your Honor has to
23 enter unless we have a stipulation order with reoh
24 that may resolve that objection. Your Honor has
25 already approved the procedures. This was actually

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1 just carry over matter.

2 THE COURT: All right. Very good.

3 SPEAKER 3: Your Honor, to go back to the
4 decision the Court made after the discussions with
5 Mr. Pollock and so forth, we would respectfully ask
6 if the Court will make the findings and conclusions
7 as to that issue, and either consider today or
8 consider at a very early date a request for either

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an interlocutory direct appeal or interlocutory
10 appeal to the extent the Court does not believe it's
11 a final order -- a final decision, because we think
12 it's important.

13 THE COURT: The Court will issue findings
14 about conclusions of law.

15 SPEAKER 3: Thank you very much. I apologize
16 for interrupting.

17 MR. GALARDI: I'm usually the ones asking for
18 orders to take appeal. So I'm sympathetic to that.

19 Number 14, Your Honor, is the motion for
20 supporting memorandum of C CD C. I believe that is
21 actually listed on the agenda as resolved.

22 SPEAKER 3: Good afternoon, Your Honor.
23 Robbie westerman on behalf of C CD C Marion. That's
24 correct; we resolved that matter with the debtors.
25 That motion is withdrawn.

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1 THE COURT: Okay. Thank you.

2 MR. GALARDI: Your Honor, the next matter on
3 the agenda was Panattoni Denton's motion to compel.
4 I think the only outstanding issue under that one
5 that has not been consensually resolved was the stub
6 rent. With Your Honor's decision, I believe that is
7 now resolved.

8 SPEAKER 3: Correct, Your Honor, Neil
9 McCullough on behalf of Panattoni. That's true with
10 respect to 15 and 17.

11 THE COURT: And 17?

12 SPEAKER 3: Yes, sir.
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13 THE COURT: All right.

14 MR. GALARDI: Your Honor, the next objection
15 is objection of landlords -- I can't read my own
16 writing. I believe this too was a stub rent issue.
17 It's docket number 627. I don't know if counsel is
18 here.

19 THE COURT: Yes.

20 SPEAKER 3: Good afternoon again, Your Honor.
21 William Gray for Raymusey's Inc. 146 Millbury LLC,
22 Interstate Augusta Properties LLC, E and A Northeast
23 Limited Partnership, and NPP Development LLC. The
24 issue was the stub rent. Thank you, Your Honor.

25 THE COURT: All right. Thank you.

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1 MR. GALARDI: The next matter that we have
2 not addressed is item number 18 which is the motion
3 supporting a memorandum of Polaris Circuit City. I
4 have that was simply a stub rent issue as well.

5 SPEAKER 3: That's correct, Your Honor.

6 THE COURT: All right. Thank you.

7 MR. GALARDI: Number 19, Your Honor, is the
8 motion of Hayward 880 LLC. Your Honor, we actually
9 have two issues here. One was stub rent. The other
10 was that the landlord had also wanted us to pay
11 taxes. My understanding those are estimated taxes.
12 And obviously, given that Your Honor's opinion --
13 decision and also the auto track, we think it's not
14 appropriate for us to be ordered to pay estimated
15 taxes at this point.

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THE COURT: All right.

17

SPEAKER 3: Paul Bliley for Hayward 880. I

18

assume your ruling would apply to that.

19

THE COURT: It would, yes.

20

MR. GALARDI: I guess you're number 22.

21

SPEAKER 3: 20.

22

MR. GALARDI: The next one is save mart super

23

markets; again, a request to pay rent, CAM related

24

charges. Your Honor, that also had the stub rent

25

issues. That also had an issue with respect to late

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charges and potential interest. Your Honor, we

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didn't argue that one. The debtors would believe

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that those are not -- that they're not entitled to

4

administrative expense priority. I'm sure counsel

5

will. What I would suggest is we simply reserve

6

that issue in a claim if that works for you.

7

SPEAKER 3: That's fine.

8

THE COURT: All right. So those issues will

9

be reserved.

10

SPEAKER 3: Paul Bliley for save mart, Your

11

Honor.

12

MR. GALARDI: The next one is matter number

13

21 which is C C investors 1997, LLC. My

14

understanding is that was simply a stub rent

15

request.

16

SPEAKER 3: Judge, Paul Bliley again for C C

17

investors. I think this is the one where the

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payment was due on November the 25th. Under what

19

Mr. con dealy said, I assume that would apply to

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20 that.

21 THE COURT: It would. So you'd be entitled,
22 then, to payment for the 15 days in that case.

23 MR. GALARDI: I think your 25th covers the
24 entire November, right?

25 SPEAKER 3: Correct.

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1 MR. GALARDI: So I think it's still -- even
2 though it's the 25th, I think it's 20 days post
3 filing. We'll make sure it's whatever it covers.
4 But I think it's the 25th for the entire month.

5 SPEAKER 3: Correct.

6 THE COURT: I misspoke.

7 MR. GALARDI: Moving to matter 22, that is
8 the motion of luck now landlords. Again, there is a
9 late issue. December, I think, has been taken care
10 of. I may be wrong.

11 SPEAKER 3: Correct.

12 MR. GALARDI: And November is in arrears. So
13 we would make the same arrangements, all rights
14 reserved under late fees and administrative status.
15 I think this is a November paid arrears lease. So
16 we'd still do the period of time. And November is
17 the November in arrears. So it's actually not due
18 and payable yet. But we would pay it timely for the
19 entire month of December, as opposed to issue right
20 now.

21 SPEAKER 3: Correct.

22 THE COURT: All right.

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23 MR. GALARDI: Your Honor, moving to 23, that
24 is the motion by Annapolis plaza LLC. My
25 understanding is the only outstanding issue was the
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1 November stub rent. The December rent has been
2 paid.

3 SPEAKER 3: That's correct, R A Stein on
4 behalf of Annapolis plaza.

5 MR. GALARDI: Your Honor, matter number 24 is
6 the memorandum of law of Baker Natick and a number
7 of landlords. As noted in the status, there was
8 really only -- the only open issue was one location,
9 which was baker Natick can. And I believe that the
10 only issue there was the stub rent. And I think
11 Your Honor's decision discloses of this matter.

12 THE COURT: Mr. gray?

13 SPEAKER 3: Good afternoon, Your Honor.
14 William gray for the movants on this motion. There
15 were seven clients that were included in this.
16 Seven of them have been resolved. So Your Honor's
17 ruling would pertain to baker Natick promenade LLC.
18 All the rest of the clients on that motion have been
19 resolved.

20 THE COURT: All right. Thank you.

21 MR. GALARDI: Your Honor, the next matter is
22 25, which is the order compelling payment and
23 joinder 120 orchard, I believe this is the gentleman
24 that has raised the stub rent sublease issue, Your
25 Honor.

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1 THE COURT: And I think we probably need to
2 re-address that.

3 MR. GALARDI: I think that's probably
4 correct, Your Honor. I think from the debtor's
5 position, again, we may have a disagreement. We did
6 collect November rent. Clearly with respect to the
7 rejection and any December rent, we have no
8 objection to turning over rents we collected post
9 petition. And I think if you look carefully at the
10 language from K-Mart -- again, I'm not sure this is
11 the case, but it was amounts, I think, collected
12 post the effective date. In either event here we
13 have a November -- I think this is a November 10th
14 -- it may not be, but I think this was a November
15 10th rejection. If we recovered rents, or actually
16 were paid money post petition, that's why we were
17 prepared to give up the December. We collected the
18 November rent pre petition. I understand that there
19 may be a certain unfairness to that. But at the
20 same time, I don't think with the comingling and
21 everything that we and the committee have discussed,
22 that it is our obligation to turn that over. In
23 addition, since we are rejecting effective November
24 10th, we don't think that we have a post petition
25 expense. But I'll let the gentlemen discuss the

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1 issue.

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2 THE COURT: Address the argument that was
3 made that the Court can condition the payment to
4 have rents you collected with connection with
5 ordering or granting the the motion to reject the
6 lease.

7 MR. GALARDI: Your Honor, again, procedurally
8 I think it's improper, because the motion to reject
9 is a simple 365 decision that is the business
10 judgment of the debtors. To condition it would mean
11 that if we didn't pay it, what happens? No
12 rejection. No assumption until that amount was
13 paid. Really, it is a claim issue. It is a motion
14 to compel payment or request for an administrative
15 expense. There are other statutory avenues for
16 counsel to pursue on that behalf. I don't think
17 it's a valid objection to a rejection that you have
18 to pay such amounts. That's to preserve all rights
19 with respect to amounts, be them administrative or
20 unsecured. But I think it's actually a counter
21 claim, if you wanted to go through all the legal
22 maneuvering. So it's procedurally not proper to
23 therefore condition it on that, because all it would
24 do is burden the estate for an additional expense
25 until it paid it or until it was litigated to pay

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1 it. We obviously don't think it was due and
2 payable, Your Honor. That does not at all preclude
3 them from arguing an equitable trust or some grounds
4 for saying that they should be able to get back from
5 us the rent we received pre bankruptcy from the

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6 subtenant.

7 THE COURT: All right. Thank you.

8 SPEAKER 3: Daniel Kerrihan, Your Honor, for
9 the orchard landlords.

10 Quite contrary, Your Honor, it's not just a
11 question of a counterclaim or a constructive trust
12 complaint or some other sort of thing. It goes to
13 the fundamental decision by the court whether to
14 recognize the rejection as of the tenth of November
15 as a valid exercise of the debtor's business
16 judgment. And as Judge Tieson said, as Judge
17 Mitchell said, as the Ames case said -- fourth
18 circuit in an old case has said, the debtor's
19 business judgment is a shield, not a sword. And
20 what the effect of interpreting the exercise of the
21 debtor's business judgment here is both a shield and
22 a sword. The rejection is supposed to protect the
23 debtor from ongoing obligations. And it is not to
24 enable the debtor to collect money as they knew when
25 they were going to file. They knew that they were

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1 going to take in the money for the subtenants. They
2 knew they weren't going to pay their November rent,
3 yet they took it in. It is not supposed to be a
4 weapon against the landlords or any other creditor
5 for that matter. When business judgment is used as
6 a sword as well as a shield, then it tips the
7 balance that's been structured by the bankruptcy
8 code. And then in those circumstances the Ames

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9 court said -- and as judge Tyson and judge Mitchell
10 have said in the context of the doctrine of
11 necessity -- then it's an improper use of the
12 debtor's exercise of business judgment. And the way
13 the court can correct that is the way the Chambliss
14 court corrected it and the way the K-Mart court
15 corrected it. What it says was debtor, if you want
16 the benefit of the rejection and the exercise of
17 your business judgment at a date earlier than when
18 you have had the benefit -- the full benefit for the
19 entire month of the sub rent that was paid, and the
20 taxes that were paid, and the CAM charges that were
21 paid; then your exercise of business judgment is
22 going to be conditioned on paying that money over to
23 the landlord. Alternatively, you can wait until the
24 end of the month to have your effective date of
25 rejection.

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1 I'd point out also -- and this is somewhat --
2 the confusion here that's created by the -- of the
3 other piece of this puzzle, which is the objection
4 to the original motion to reject. That's now set
5 for hearing on January 29th as a result of the
6 objection by the subtenant and our joinder in that
7 objection. But the principle is fundamentally the
8 same. We're not arguing about getting back to
9 November 1. We recognize that if we're going to use
10 the allocation of prorating method, that November 1
11 through November 10 is whatever it is. But for the
12 remainder to have month, the debtor can get value

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13 out of that sublease in two ways, or the lease in
14 two ways. One, it occupies the space and continues
15 to sell out of it, G O B sale or otherwise. That's
16 not what they did here. What they did was got the
17 economic value of that, 100 cents on the dollar up
18 front. What's the difference economically between
19 having been paid in advance and being paid later?
20 There is none. There is none, Your Honor. And
21 that's why this situation unique. And that's why
22 the business judgment of the the debtor should not
23 be allowed to be used to upset the balance and
24 should not be allowed to be used as a sword instead
25 of just a shield. The shield part of it, yes. From
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1 November or December 1 forward, if they want to cut
2 it off at that point, fine. That's within their
3 business judgment to say that the whole arrangement
4 is burdensome. But to take the money and then want
5 it cut off at that point and also want to keep the
6 money, Your Honor, that's fundamentally wrong.

7 THE COURT: Why isn't it just a claim? The
8 debtor had the money. It was required. Everybody
9 acknowledges it was required to pay a lot of
10 creditors in this case. Why isn't it just a claim?

11 SPEAKER 3: Well, it is a claim, Your Honor.

12 THE COURT: Okay.

13 SPEAKER 3: But it's also -- it is also --
14 but that claim -- section 365 is supposed to provide
15 in the context of unexpired leases and executory

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16 contracts a bridge between the pre petition time and
17 the post petition time. If the debtor stays in
18 there and gets the burden -- gets the benefit of
19 that unexpired lease or the executory contract, then
20 it is incumbent upon the debtor to pay for that
21 privilege. Now, we may approximate B back to the
22 timing exercise there as to whether it's an
23 administrative claim that needs to be paid now or
24 later, but it has the the overlay of this bridge
25 that's being put there. What the debtor wants to do

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1 is we got the money. We want to get out -- now that
2 we've got the money and we haven't paid for it, we
3 want to get out of this lease. Your Honor, that's
4 where the exercise of the court's discretion as to
5 business judgment comes in. And the business
6 judgment should not be allowed to inflict -- to be
7 used as a sword and not as a shield. Everything in
8 bankruptcy is a claim. I mean, the landlord's
9 requests for payments under 365 D 3 is a claim.
10 It's a claim under 503. It's a claim under 507. If
11 it's a pre petition it's a claim for 502 and 365
12 because it's re effective as of the filing at a time
13 in some circumstances. It's all a claim. But as
14 your has pointed out, it's really a question of
15 timing if it's just a claim. But it's not just a
16 claim. This is also about the exercise of the
17 debtor's business judgment. And it is being used
18 here both as a sword and a shield. And it was only
19 to be used as a shield. And it's not just the law

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20 of unintended consequences. You heard the testimony
21 from the debtor's expert they knew going in what it
22 was going to look like. To do that and to allow
23 them to do that is to allow them to exercise their
24 business judgment improperly. And that's why the
25 K-Mart courts and that's why the chapel bliss court

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1 conditions it on payment. Alternatively you could
2 move the date of rejection out to the end of the
3 month. And that's an issue for January 29, I
4 suppose.

5 Let me say one other thing, Your Honor, if I
6 may: The reason is -- let's look at it in terms of
7 the post petition. The debtor's professional claims
8 for fees, for reimbursement of expenses, those are
9 all claims of the sword. They're a particular kind
10 of claim. They're administrative claims. The
11 claims for people who are providing the coffee in
12 the offices, the people who are delivering goods to
13 the debtors, those are all claims. Now, those are
14 all getting paid in the ordinary course. And, in
15 fact, what we do in some circumstances, especially
16 with the professionals -- and this is an entirely
17 appropriate thing to do -- is the fact they haven't
18 been appointed day one to represent the debtor
19 doesn't change the fact that between day one and the
20 time they are appointed, that they are allowed to be
21 compensated. Can the debtor just say well, you
22 didn't get appointed till December 15th, then you're

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23 out of luck for the first month and-a-half of the
24 case? No, of course not. That's not appropriate.
25 Nor is it appropriate in this case to deny payment
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1 to the landlords when the debtor has had the benefit
2 of it in the most tangible way that you can
3 identify, which is they got the money. And they got
4 it in advance. Under those circumstances, the
5 exercise of business judgment by the debtor is
6 inappropriate to try to get the benefit of cutting
7 off their obligations on going-forward basis and
8 yet to retain the money. And frankly, the remedies
9 that are being proposed is, as I think has been
10 mentioned in the prior argument, if we get back to
11 constructive trust, if we get to tracing and all
12 that other sort of stuff, what does a landlord like
13 ours have that has 55 thousand dollars in prorated
14 payments for the month of November, what can that
15 landlord legitimately -- forget legitimately,
16 pragmatically do about it? Not much. All we can do
17 is argue to the court that they shouldn't be able to
18 keep the money and reject our lease. And that is
19 not an appropriate exercise in business judgment.
20 Thank you, Your Honor.

21 THE COURT: Thank you, sir.

22 MR. GALARDI: Your Honor, I don't think we're
23 actually using business judgment as a sword and
24 shield. I don't quite understand that. If we only
25 rejected the sublease, the sub lessee would have to

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1 pay his rent for the entire month and could have
2 remained there. If we reject the lease, we don't
3 have to pay the rent. So we're putting two things
4 together. But we can reject and that's a pre
5 petition claim. There's -- you know, and the money
6 went into the system. There's no nefarious conduct.
7 Perhaps we knew that this would come in. Yes.
8 Maybe it was in the model. But at the same time,
9 the objection is the landlords don't even have to
10 accept that rent if they didn't want to. They have
11 the right to throw that subtenant out of those
12 premises. It just so happens that this particular
13 landlord wants to accept that rent. The business
14 judgment is quite simple: One, we made a business
15 judgment to reject the sublease. We have been paid
16 the rent. That subtenant could stay there if we
17 hadn't also rejected the overlord.

18 Two, we made a business judgment to reject
19 the overlord's lease. We don't have to pay that
20 rent. We understand that they may have an equitable
21 argument. We understand that they may say, well,
22 because this subtenant stayed there, we're entitled
23 to that. That's what they have a basis for making a
24 claim. But it doesn't defeat either our business
25 judgment with respect to the rejection or with

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1 respect to the sublease. The money issue is simply

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2 a separate issue. It's a claim, as Your Honor said.
3 Do we have a claim that because we rejected our
4 subtenant, stayed in the landlord's premises, to
5 they have a claim? Well, they may have a claim
6 against us. They may have a claim against the
7 subtenant. The subtenant should have vacated the
8 premises. But that's not something that's
9 appropriate as a response to our motion to reject.

10 So we'd ask Your Honor to approve our motion
11 to reject, all rights reserved about their seeking a
12 claim for any sub rent that we would have received
13 on November 1st or prior to the filing.

14 THE COURT: My ruling today on the motion to
15 reject, or is that being carried over? I thought I
16 was just being asked to rule on the motion to compel
17 payment of the --

18 MR. GALARDI: Well, I would only ask for the
19 ruling on the motion to compel payment. If you want
20 to hold the date of rejection over to the 29th,
21 that's perfectly fine.

22 THE COURT: Is that what I'm being asked to
23 do?

24 SPEAKER 3: Your Honor, that was my
25 understanding. That's why I addressed it up front,
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1 is that the rejection motion was held over to the
2 29th. The compelling of the rent now or in the near
3 future is an issue for today.

4 THE COURT: Okay. And so, consistent with my
5 ruling earlier this afternoon, I'm not going to

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6 compel the payment of the post petition rent at this
7 time.

8 MR. GALARDI: Thank you, Your Honor.

9 THE COURT: And that's without prejudice to
10 being able to come back and ask for it as changes
11 might occur.

12 MR. GALARDI: And when we decide the actual
13 rejection date, which is -- that's for the January
14 29th hearing tape.

15 THE COURT: That's my understanding.

16 SPEAKER 3: Thank you, Your Honor. May I be
17 excused?

18 THE COURT: You may. Thank you, sir.

19 MR. GALARDI: The next item is item number
20 26, which is the motion to compel rent of McAlister.
21 My understanding that the only issue there was the
22 stub rent and taxes. I don't know if counsel --

23 SPEAKER 3: William gray on behalf of
24 McAlister Square. This is a store closing. This
25 matter has been resolved.

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1 THE COURT: Okay. Very good.

2 MR. GALARDI: Thank you, Your Honor. The
3 next one is item number 27, which is a long list of
4 landlords, starting with amherst VF. My
5 understanding, Your Honor, is this was a stub rent
6 issue, and I think has been addressed by Your
7 Honor's decision.

8 SPEAKER 3: William gray on behalf of --

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9 THE COURT: You don't have to say them all.

10 SPEAKER 3: The 10 landlords that are a part
11 of the motion. One landlord, Vornado Gun Hill Road
12 has been resolved. Your ruling would apply to the
13 remaining nine.

14 THE COURT: All right. Thank you.

15 MR. GALARDI: Your Honor, the next one is
16 number 28, which is the Cole C C Grovel and FL,
17 Florida. I believe this was a stub rent, but it was
18 the accrual method of -- I think this was -- if I'm
19 not mistaken, this is the one where we pay at the
20 end of the month for the entire month. So I think
21 Your Honor's ruling is that we should be paying the
22 20 days for November timely now for those periods,
23 but need not pay November 1 to 10?

24 THE COURT: That's correct.

25 SPEAKER 3: Thank you, Your Honor.

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1 MR. GALARDI: Your Honor, item number 29 is
2 the colonial heights holdings LLC. My understanding
3 is that this is resolved.

4 SPEAKER 3: That's correct, Your Honor. This
5 was a payment in arrears. Rent was due on the last
6 business day of the month, and they have agreed to
7 pay.

8 THE COURT: Thank you.

9 SPEAKER 3: Thank you.

10 MR. GALARDI: Number 30, Your Honor, is the
11 motion of C I M slash Birch Street. My
12 understanding is this was only an issue of stub

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13 rent, and I think it's been addressed by your
14 decision.

15 SPEAKER 3: That's correct, Your Honor.

16 THE COURT: All right. Thank you.

17 MR. GALARDI: Number 31, Your Honor, is the
18 motion of principal life insurance. It's stub rent,
19 and I believe this is payable in arrears, and there
20 was an interest issue. I think Your Honor's
21 decision with respect to -- this is what I got -- it
22 is payable in arrears November 30th to November 10th
23 we'll pay. And I would reserve all rights on
24 whether interest on that amount is due and payable,
25 unless counsel has an objection to that.

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1 THE COURT: All right. That is the ruling.

2 MR. GALARDI: The next motion is 32, which is
3 the motion of the Pratt Center LLC. My
4 understanding is that the only open issue on this
5 one is the payment of stub rent, which was addressed
6 by Your Honor's decision?

7 SPEAKER 3: Your Honor, that is correct;
8 however, as stated in the motion, there was a second
9 reason for requesting payment, and it relates to an
10 objection that was filed by three landlords: UTC 1
11 LLC, Pratt Center LLC, and Valley Corner Shopping
12 Center, two of which are the subject of the court's
13 ruling today.

14 It was a limited objection filed to the
15 debtor's motion basically assuming the agency

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16 agreement among the debtors and hillco merchant
17 resources, Gordon brothers LLC, and authorizing the
18 the debtor to continue the agency agreement sales --
19 agency agreement sales pursuant to store closing
20 agreement. In negotiating the resolution of that
21 objection, we reached agreement with the debtor
22 which in effect said that the stub rent for all
23 three of those locations would be paid. And
24 attached as exhibit D to the motion is an email
25 exchange between myself and debtor's counsel to that
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1 effect. We wrote that this shall confirm that the
2 above referenced landlords agree to withdraw their
3 pending objection in exchange for payment of the
4 stub rent for November and the modifications of the
5 G O B procedures as agreed to by Stephen petro,
6 counsel for Gordon brothers, and reserving all
7 additional rights.

8 We then received a responsive email saying
9 confirmed. We would try to have the November stub
10 rent paid by next Friday, November 12th. We in fire
11 rd about having payment for Pratt center and valley
12 corners. The response was, well, we didn't have
13 authority to pay stub rent for those two locations.
14 So we're not planning on paying it. They did pay
15 for UTC 1, but have not paid the other two. And we
16 would ask that the Court enforce that settlement.

17 MR. GALARDI: Are these all -- we have paid
18 -- Your Honor, as I remember, we told you with
19 respect to the store closing motion, that when we --

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20 if they were covered by the agency agreement, we
21 that has been paid. Are these other two covered by
22 -- are these store closings?

23 SPEAKER 3: They were not store closings.

24 MR. GALARDI: And that's why we didn't pay
25 the other two, Your Honor.

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1 SPEAKER 3: Understood. The rationale for
2 including them in the objection was because we
3 believe there may be relief that went beyond
4 strictly those stores listed on the store closing
5 procedure Exhibit. And obviously, we withdrew the
6 objection with the understanding that all three
7 would be paid.

8 MR. GALARDI: And Your Honor, I see the
9 email. I don't dispute that somebody may have sent
10 that email. The issue simply came to our attention
11 that we thought they were all three governed by the
12 hill co-agreement. They weren't. So that is our
13 fault for having done that. we have always taken the
14 position in this court that if it were not governed
15 by the hillco agreement, we were going to be
16 fighting this stub rent payment. I apologize for
17 that. Your Honor can rule. But I understand that
18 was a simple miss statement in an email from one of
19 our associates that it would be paid. I'm thinking
20 that it was all governed by the same hillco
21 agreement.

22 THE COURT: I haven't seen what is there. I

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23 think what we ought to do is carry this over to the
24 next omnibus date, set it down for it because we'll
25 probably need some evidence if you're going to try
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1 to enforce the settlement agreement, what was agreed
2 to and the like. And, of course, that would give
3 Mr. Galardi an opportunity to respond to it, as
4 well.

5 SPEAKER 3: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 MR. GALARDI: The next matter on is matter
8 number 33, Your Honor, which is again a debtor's
9 motion authorized in the rejection of certain
10 unexpired leases. There were three objections to
11 that motion. The first two, one by Carmax business
12 service, has been resolved. The second by Food Lion
13 LLC has been resolved. And the third was an
14 objection by Kennesaw, I believe, which is a
15 subtenant. And I believe that matter is going
16 forward.

17 THE COURT: All right.

18 SPEAKER 3: Your Honor, Paul Bliley again. I
19 represent Carmax business services and it has been
20 resolved as to us.

21 THE COURT: Very good.

22 SPEAKER 3: Good afternoon, you know, Roy Wes
23 Terman on behalf of Food Lion. Our objection has
24 been resolved as well. I believe some revised
25 language is being circulated, and a revised order is

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1 going to be submitted for Your Honor's
2 consideration.

3 THE COURT: Very good. Thank you.

4 SPEAKER 3: Good afternoon, Your Honor,
5 Michael con deal is on behalf of Cole C C, Kennesaw
6 Georgia, LLC. We are objecting to the date in which
7 the lease is determined to be rejected. And the
8 debtor is looking for the rejection date to be
9 effective when the pleadings were filed.

10 This is a subtenant case, Your Honor, where
11 rent was collected by the debtor on the first to
12 have month from the landlord. On the 31st of this
13 month, there is rent that the due to Cole of
14 \$124,000, plus taxes, utilities, insurance,
15 maintenance and so forth. The debtor is getting the
16 benefit of the property for the full month, and it
17 received the rent for the full month. This is, in
18 that sense, similar to the argument that Your Honor
19 just heard previously.

20 There is also some distinguishing factors
21 here, because the lease agreement itself provides
22 specifically for an assignment and transfer of any
23 rents that are due from Circuit City to the
24 landlord. So upon the occurrence of that -- of the
25 default -- upon the occurrence of the bankruptcy

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1 filing, default occurred under the lease in which it

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2 mandated that the lease payments be made and an
3 assignment of all rights and interests in those
4 lease payments was made to Cole in that instance,
5 which entitled it to the payment of the rents that
6 are owed. In November, there was -- the lease
7 payments were received. In December, we're not at
8 the end of the month yet. So the payments haven't
9 been received. But the appropriate time for any
10 rejection would be on -- effective on December 31st
11 when the rent payment is due and when the period in
12 which the existing subtenant's rent is completed.
13 So we'd ask that the debtor be ordered to pay the
14 rent that effective as of that time and that the
15 lease not be rejected until that time, and that we'd
16 be entitled to the rent that's owed.

17 THE COURT: Mr. Galardi?

18 MR. GALARDI: Your Honor, we don't have any
19 objection to the rejection being effective
20 December -- I think the rent is due December 31st.

21 SPEAKER 3: Correct.

22 MR. GALARDI: This is an odd situation where
23 the subtenant pays at the beginning of the month.
24 We paid at the end of the month. So we would reject
25 effective December 31st; and given all Your Honor's

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1 rulings and what we've said about this, we will pay
2 the full month of December on December 31st. I
3 think that resolves his objection.

4 THE COURT: All right. Very good.

5 SPEAKER 3: Thank you, Your Honor. And that
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6 would include the maintenance and utilities and the
7 amounts that are due under the lease.

8 MR. GALARDI: Again, Your Honor, I
9 think we're going to reserve our right -- the base
10 rent, yes. As to the maintenance, utilities and
11 what periods they cover, I think that goes to the
12 stub rent. If it's only for the month of December,
13 yes.

14 SPEAKER 3: Okay. Thank you, Your Honor.
15 We'd ask that the order itself contain a provision
16 that the rejection is effectively a termination of
17 the lease. We don't have to come in for relief of
18 stay or any further action.

19 MR. GALARDI: I think it's a breach of the
20 lease. I don't think rejection is a termination.

21 SPEAKER 3: Well, that's why we're asking for
22 that determination, Your Honor, so we don't have to
23 then come in for separate relief of stay.

24 THE COURT: Is that motion before me?

25 SPEAKER 3: No.

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1 THE COURT: You can negotiate.

2 MR. GALARDI: We'll discuss it, yes.

3 THE COURT: Otherwise, you need to file a
4 motion.

5 SPEAKER 3: Thank you, Your Honor.

6 MR. GALARDI: Your Honor, the next is the
7 informal response of Barbara Goldsmith, which I
8 understood has been resolved.

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9

SPEAKER 3: Yes.

10

THE COURT: Did you understand it has been

11

resolved?

12

MR. GALARDI: My understanding is that it has

13

been resolved.

14

SPEAKER 3: I represent a different --

15

MR. GALARDI: I think they're getting ready

16

for the next stub rent.

17

THE COURT: Okay. Sorry.

18

MR. GALARDI: So that takes care of matter

19

33, Your Honor.

20

SPEAKER 3: Your Honor, Calena Miller again,

21

Your Honor, on behalf of general Orlando aviation

22

authority. My client did not file a formal

23

objection to matter 33, but we have a resolution and

24

agreement with the debtors that the effective date

25

of the rejection for the particular lease of my

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client will be December the 31st. So I just wanted

2

to make sure that's reflected on the record. That's

3

with respect to location 5166 east colonial drive in

4

Orlando, Florida.

5

THE COURT: Thank you, ma'am.

6

MR. GALARDI: I've been informed that that's

7

correct, Your Honor.

8

THE COURT: All right.

9

MR. GALARDI: Your Honor, number 34 is the --

10

that concludes the matters under 33. Matter 34 was

11

the motion of part Arthur holdings. Again, it was a

12

stub rent payment and I'm authorized to say that all

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13 matters to 34 have been resolved by your ruling.

14 THE COURT: All right. Very good.

15 MR. GALARDI: Your Honor, going back, there
16 was one matter that was left open.

17 THE COURT: Yes.

18 MR. GALARDI: Back on 7 there were objections
19 R and S, I believe.

20 THE COURT: Yes.

21 MR. GALARDI: We have agreed that the
22 rejection date is November 10th, 2008, but that
23 the -- M and T reserves the right to a certain
24 administrative claim on the basis that there is a
25 hold over tenant because we did not surrender. So
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1 we'll leave open the claim issue with them but the
2 rejection date is in fact, November 10th. And that
3 resolves --

4 THE COURT: Ms. McLemore, is that your
5 understanding?

6 SPEAKER 3: That is my understanding with one
7 express reservation that if anything changes with
8 regard to the stub rent issue going forward, that we
9 would reserve our right to file a motion to compel
10 the stub rent.

11 MR. GALARDI: I assume that goes without
12 saying for all the tenants.

13 THE COURT: Yes, it does.

14 SPEAKER 3: Thank you, Your Honor.

15 MR. GALARDI: And that actually does conclude

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the matters on my agenda, I believe.

17 THE COURT: All right. On the issue
18 concerning the nonpayment of the stub rent, I would
19 like the debtors to submit proposed findings of fact
20 and conclusions of law. My understanding is you're
21 submitting individual orders, but I think that that
22 can be one that addresses all of them, and just
23 style it that way.

24 MR. GALARDI: That's fine. Thank you, Your
25 Honor. I have no further business today, Your
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1 Honor.

2 THE COURT: Okay. We have one matter that
3 was from this morning, item number 4, which
4 Mr. Foley, you had said that you were trying to
5 resolve. Is that being carried over?

6 MR. GALARDI: Your Honor, what we would
7 propose to do -- that was the D J M matter that we
8 were trying to do. I don't believe we will get a
9 resolution on this today. We have another meeting
10 tomorrow.

11 What I would propose to do, Your Honor, is
12 to, one, have authority -- there is an objection as
13 to the fee structure. In the event that we can come
14 to an agreement with the committee, we'd like to
15 submit under certification of counsel a stipulated
16 order resolving that.

17 If not, I'd like to put it on the next
18 available hearing date, which may not be the omnibus
19 date. It may be an earlier date if we can get it,

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20 because their activity is going on very rapidly as
21 we speak. And so, the sooner I can get an order in
22 for them if it's agreed to, the sooner we -- the
23 better we'd all feel. So I would like to simply not
24 carry that to a date certain right now, but have the
25 right to ask the court to put that on an expedited

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1 basis with an expedited hearing in early January, if
2 we're unable to do a consensual order.

3 THE COURT: And then, of course, if you
4 submit a consensual order with the committee, the
5 court will certainly entertain that.

6 MR. GALARDI: Thank you very much, Your
7 Honor. That does now conclude the matters. Thank
8 you.

9 THE COURT: Very good. Thank you all.

10 MR. GALARDI: Thank you again. Have a happy
11 hoi day.

12 THE COURT: You, too.

13

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